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FEDERAL COMMUNICATIONS COMMISSION REPORTS
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NOTE: The index to this pamphlet includes alphabetized document titles and other descriptive data accumulated from previous and current issues in this particular volume. Refer to pages shown on the cover of the pamphlet to distinguish which documents are available in this issue.

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—*RKO General Inc. (WFYR-FM)*

MM Docket No. 84-1085

Alien, Control

Application for permit pursuant to Section 325(b) of the Act accepted for filing notwithstanding the fact that the applicant did not comply with the citizenship requirement contained in Section 310 of the Act.

—*Sin. Inc.*

Alien, Ownership

(See: Alien, Control-*Sin, Inc.*)

Antenna, Height of

Review Board granted appeal from ALJ's ruling which rejected applicant's amendment, filed 39 days after hearing designation, that proposed to lower its antenna height to conform to FAA requirements. Amendment conferred no comparative advantage, mooted air hazard issue and required no additional issues, did not prejudice competitor, and did not disrupt hearing.

—*Circle L. Inc.*

MM Docket No. 85-50

Appeal, Denied

Review Board denies authorized appeal from ALJ's order denying petition to add a comparative programming issue. The applicant failed to make sufficient threshold showings, as required by *Chapman Radio and Television Co.*, 7 FCC 2d 213 (1967), and *George E. Cameron, Jr. Communications*, 71 FCC 2d 460 (1979), which decisions have continuing vitality.

—*Wilshire District B/cing*

MM Docket No. 84-932

Appeal, Sustained

(See: Antenna, Height of-*Circle L, Inc.*)

Application, Acceptance
Commission announced procedures for accepting applications for the 689 new FM channel allotments and for opening up the FM Table of Allotments for new petitions.
—FM B/c Assignments
MM Docket No. 84-231

Application, Amendment of, After Designation
Hearing proceeding remanded to determine whether surviving applicant made intentional misrepresentations about its financial proposal. FCC overturns Review Board's determination that applicant is not financially qualified. Mass Media Bureau ordered to assess applicant's updated financial showing and recommend to ALJ whether further hearings on this matter are required.
—Christian Children's Netwk., Inc.
BC Docket No. 80-461

Application, Amendment of, Effect of Delay in Filing
Review Board affirmed *ID* grant to sole remaining applicant and denied exceptions of party-intervenor. Weight of evidence strongly supported *ID*'s resolution of common ownership issue in applicant's favor. Significant failure to report loss before designation of initial transmitter tower might ordinarily warrant comparative demerit, but was inapposite here. Amendments were properly accepted by ALJ.
—Ithaca TV Associates
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—Las Americas Communications, Inc.
MM Docket No. 84-115

Application, Certification of
(See: Application, Amendment of, Substantial Change-*Las Americas Communications, Inc.*)

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(See: Application, Acceptance of-*FM B/c Assignments*)

Carelessness
Review Board affirmed one applicant's site disqualification and misrepresentation/ineptness demerit; reduced ownership integration credits of other applicants because of inadequate corporate underpinnings or unreliable integration commitments; and awarded TV construction permit to new winner, a limited partnership whose general partner was given 100% integration credit over objections.
—*Houston Family TV, Ltd.*
BC Docket No. 82-686

Character Qualifications
Review Board dismissed joint request for approval of settlement agreement which was contingent on reversal of ALJ's disqualification of dismissing applicant. ALJ's Sec. 307(b) findings and conclusions adopted summarily and new FM grant affirmed. Grantee's comparative superiority was not excepted to.
—*B&D Wireless Radio, Inc.*
MM Docket No. 84-385
(See also: Application, Amendment of, Substantial Changes-*Las Americas Communications, Inc.*)

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Common Carrier
Commission adopts Third Further Notice in CC Docket No. 81-893 which proposes the deregulation of: (1) National Security and Emergency Preparedness embedded CPE owned by Independent telephone companies; and (2) other CPE still subject to tariff.
—*Customer Premises Equipment*
CC Docket No. 81-893

Community Qualifications

In an AM proceeding involving a choice of granting three separate and distinct communities their first local outlet or one community its first local outlet, Review Board held that Section 307(b) favored grant of three applications notwithstanding that total population of three winning communities was substantially less than losing community.
—*Archilla-Marcocci Spanish Radio Co.*
MM Docket No. 84-49

Comparative Case, New Criteria

Commission added a new attribute under the comparative hearing criterion of securing the best practicable service which would enhance the integration proposal of a daytime-only licensee applying for an FM channel in the same community.
—*FM B/c Assignments*
MM Docket No. 84-231

Comparative Coverage Issue

Applicant with three radio stations given slight diversification preference over applicant with nine stations. This preference overcomes minimal residence preference and preference for providing service to an 8% larger population overall and a fifth nighttime service to 1,285 people.
—*Mark L. Wodlinger*
MM Docket No. 84-1084

Comparative Criteria

Applicant may not increase ownership after "B" cut-off date in order to enhance integration credit; even if it could, it would lose on unchallenged diversification preference.
—*Mountain Media, Inc.*
MM Docket No. 84-555

(See also: Comparative Case, New Criteria-*FM B/c Assignments*)

(See also: Comparative Coverage Issue-*Mark L. Wodlinger*)

Comparative Hearing

(See: Comparative Case, New Criteria-*FM B/c Assignments*)

(See also: Character Qualifications-*B&D Wireless Radio, Inc.*)

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(See: Appeal, Denied-*Wilshire District B/cing*)

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Section 74.1232(d)(1) of the Rules does not proscribe the authorization of a commercial FM translator to the licensee of the primary station proposing to provide service outside that station's 1mV/m contour and within the 1mV/m contour of an unbuilt, non-operational commercial FM broadcast station assigned to a different principal community.

—Ber-Tec B/cing Inc.

Contour Overlap

Conflicts in measurements made to establish signal contours are to be resolved by averaging all properly taken and presented measurements.

—GSM Media Corporation
BC Docket No. 81-606

Contract Filing With FCC

Commission eliminates requirement that radio licensees file copies of their network affiliation contracts with the Commission. Commission felt that with over 100 available radio networks, no one program source could have significant market power over any individual radio station. However, given that there are only a few major national television networks, Commission retains filing requirement for television licensees who affiliate with national networks.

—Amendment of Part 73
MM Docket No. 85-5

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—Turner B/cing System, Inc.

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(See: Comparative Case, New Criteria-*FM B/c Assignments*)

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(See: Comparative Coverage Issue-*Mark L. Wodlinger*)

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—*Public Mobile Radio Service*
CC Docket No. 80-57

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—*RF Lighting Devices*

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(See also: Application, Acceptance of -*FM B/c Assignments*)

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Gen Docket No. 85-172

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Interlocking Directorates
Rules dealing with interlocking directorates revised and clarified, limiting the requirement of filing applications and reducing the amount of information for remaining applications.
—*Amendment of Part 62*
CC Docket No. 84-1330

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—*Arecibo Radio Corp.*

License, Assignment of, FM
(See: License, Assignment of, AM-*Arecibo Radio Corp.*)

License, Assignment of, Involuntary
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License, Assignment of, Procedures
(See: License, Assignment of, AM-*Arecibo Radio Corp.*)

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Commission affirmed using lotteries to select cellular radio licensees in markets beyond top-30 Metropolitan Statistical Areas. It rejected alternative licensing mechanisms, eliminated cumulative lottery

chances for nonwireline applicants engaging in partial settlements in markets beyond the top-120, modified the ownership rules for corporate applicants and required applicants to obtain a firm financial commitment.
—*Cellular Radio Lotteries*
CC Docket No. 83-1096

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Mobile Radio Service
(See: Domestic Public Land Mobile Service-*Public Mobile Radio Service*)

Mutually Exclusivity, See Comparative Hearing
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—*Charlotte TV Co.*

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(See also: Comparative Criteria-*Mountain Media, Inc.*)

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(See also: Comparative Coverage Issue-*Mark L. Wodlinger*)

Political Candidate, Station Employee

Petition for declaratory ruling denied. Where a legally qualified candidate for public office appears on a bona fide newscast in the capacity of a news reporter, rather than as the subject of the news, such appearances are subject to the "equal opportunities" requirement of Section 315.
—*William H. Branch*

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(See: Carelessness-*Houston Family TV, Ltd.*)

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(See: Equipment Authorization-*RF Lighting Devices*)

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Where application in comparative renewal proceeding was dismissed by ALJ pursuant to applicant's request that was subsequently timely withdrawn, Review Board reinstates application. Board then referred applications in proceeding to processing staff for appropriate disposition in view of court remand concerning the licensee's prior renewals.
—*KQED, Inc.*
MM Docket No. 84-567

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Memorandum Opinion and Order adopted addressing petitions for reconsideration regarding *Report and Order* authorizing television stations to operate teletext services. Commission addressed petitions that collectively raise issues concerning six aspects of its decision. Reconsideration was denied with respect to all other issues as petitioners failed to demonstrate any errors or other omissions in the *Report and Order.*
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(See: Frequency Allocation, Interservice Sharing-*UHF TV Band*)

Interlocking Directorates

Rules dealing with interlocking directorates revised and clarified, limiting the requirement of filing applications and reducing the amount of information for remaining applications.

—*Amendment of Part 62*
CC Docket No. 84-1330

FCC 85-365

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 62 of the Commission's Rules	CC Docket No. 84-1330

FIRST REPORT AND ORDER

Adopted July 11, 1985; Released July 19, 1985

BY THE COMMISSION:

Introduction

1. On December 31, 1984, the Commission released a Notice of Proposed Rulemaking (NPRM)[1] proposing to clarify and simplify Part 62 of the Commission's Rules, 47 C.F.R. §62.1, *et seq.* Part 62 implements Section 212 of the Communications Act of 1934, as amended, 47 U.S.C. §212, which prohibits any person from holding the position of officer or director of more than one carrier subject to the Act without obtaining prior Commission authorization. As stated in the NPRM, "[o]ur purpose in initiating this proposed rulemaking is to assure that the burden imposed by these Rules is commensurate with our statutory oversight obligations in the context of the current industry environment." NPRM at paragraph 1.

2. Congress designed Section 212 to guard against anticompetitive behavior arising from the interlocking of companies through sharing of officers or directors. The Commission has in the past implemented Section 212 by requiring the filing of applications containing detailed information demonstrating that neither private nor public interests will be harmed by

[1] FCC 84-627; 50 Fed. Reg. 976 (January 6, 1985).

granting authorization to hold interlocking directorates. Such requests have been reviewed on a case-by-case basis. However, in recent years these applications have been virtually unopposed, although we have routinely placed them on public notice. Our own analysis has revealed that, almost without exception, the interlocks sought do not offend public or private interests. At the same time, this processing approach has been time-consuming, costly, and burdensome, both to the Commission and to the applicants. In addition, in light of growing competition and advances in telecommunications, we have become increasingly aware that these changes have greatly affected the need for stringent regulatory oversight and intervention in the free market activities of carriers. In short, it is time to adjust our regulatory scheme for implementing Section 212 to match today's competitive environment to achieve the most effective, efficient, and meaningful regulation. We are eliminating the requirement of our rules that applicants seeking to hold interlocking directorates with non-dominant carriers as defined in our *Competitive Carrier Rulemaking*,[2] or with cellular licensees in different geographic markets, file Part 62 applications. We are eliminating unnecessary detail in information required by applicants for interlocks involving carriers still subject to the applications process (*i.e.*, dominant carriers). We are also clarifying the application of such filings as they pertain to positions upon parent or holding companies of carriers, and connecting carriers.

3. As to our proposal concerning non-dominant carriers, such carriers do not possess sufficient market power, either alone or in concert with other non-dominant carriers, to engage in predatory pricing or other anticompetitive or unjust practices. The ability of such carriers to engage in anticompetitive behavior via interlocking directorates has been substantially curbed by the telecommunications marketplace and the individual lack of market power of these carriers. Thus, if these entities attempt, through interlocking arrangements, to set prices or restrain competition, other service providers will step in to maintain prices at a competitive level or to furnish the desired service.

---

[2] Policies and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services (CC Docket 79-252), Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979), First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981), Second Report and Order, 91 FCC 2d 59 (1982), *recon. denied*, 93 FCC 2d 54 (1983), Second Further Notice of Proposed Rulemaking, FCC No. 82-187, released April 21, 1982, Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (June 21, 1983), Third Report and Order, 48 Fed. Reg. 46,791 (October 15, 1983), Fourth Report and Order, 95 FCC 2d 554 (1983), Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 922 (1984), Fifth Report and Order, 98 FCC 2d 1191 (1984), Sixth Report and Order, FCC 84-566, released January 4, 1985, 50 Fed. Reg. 1215 (January 10, 1985), Sixth Report *vacated and remanded*, MCI Telecommunications Corp. v. FCC, No. 85-1030 (D.C. Cir. July 9, 1985).

4. We also proposed in our NPRM to relieve cellular licensees operating in different geographic markets from the Part 62 applications process. It has been our belief that, since their service area is defined and limited by this Commission, our regulation of interlocks among these cellular licensees may be less stringent (even though they have not been at least at this time found to be non-dominant) because the structure of cellular radio service does not foster competition between licensees in different geographic markets.

5. Due to the unlikelihood that interlocking arrangements between or among non-dominant carriers or cellular licensees in different markets would cause harm to public or private interests, we thus proposed to authorize interlocks between such entities as a class rather than on an individual basis. In addition, we proposed an alternative and less burdensome regulatory mechanism to assure compliance with the goals of Section 212 for such entities. Such oversight would be accomplished consistent with Section 212, by reviewing interlocking directorates disclosed pursuant to our proposed interlocking directorate reporting requirement, coupled with the complaint process. *See* 47 U.S.C. §208 and 47 C.F.R §1.711, *et seq.* Because the proposed revised rules permit carriers to place desired management officials more swiftly and with less cost, we perceived that a number of positive effects would flow from these proposals.

6. Twenty parties filed comments[3] in response to our NPRM and five parties filed reply comments (see Appendix A). The commentators, with the few exceptions or modifications discussed below, were supportive of the NPRM and in almost all instances object only that our proposals do not go far enough. The comments focused upon several major issues, including: (1) our authority to eliminate the applications process; (2) requests that we eliminate applications for positions upon carriers whose status as dominant or non-dominant has not yet been determined in the *Competitive Carrier Rulemaking, supra*; (3) our proposal to exempt wireline cellular licensees in different markets from filing applications; (4) our proposed treatment of parent or holding companies and connecting carriers; and (5) our reporting requirement. Because the commenting parties unanimously concur that changed marketplace conditions require some revision of our past methods set forth in Part 62 for enforcing Section 212, our proposed reduced informational requirement (*i.e.*, reductions in the extent of detail) received substantial support. Accordingly, we

[3] One party, U S West, Inc., filed a Motion to Accept Late Filed Comments, stating that due to last-minute reproduction problems, it could not file its comments until four minutes past the 5:30 p.m. filing deadline. No party opposed the motion, and in the interest of having a complete record in this entire proceeding, we grant the motion to accept its comments.

are now addressing only those portions of the proposed rules which were the subject of controversy, and we will adopt the proposed rules as modified consistent with this discussion.

7. We first discuss the classification scheme adopted herein, as amplified by the comments we have received. In the NPRM, we set forth our belief that harm was unlikely to flow from authorizing interlocks, as a class, between non-dominant carriers or between cellular licensees in different geographic markets. However, we also explained that, because of the presence of market power or control of essential facilities, interlocks involving dominant carriers (or carriers whose status as dominant or non-dominant has yet to be determined) might result in anticompetitive conduct. Thus, we proposed to eliminate the necessity for case-by-case review only in the first instance.

8. The comments reveal that the proposed revisions to Part 62 will yield a number of benefits which were not fully discussed or mentioned in the NPRM: (1) officials will no longer be deterred from accepting interlocking positions due to the burden of filing public applications and submitting to the government approval process; (2) the agency will continue to know who holds interlocking positions with which carriers and can call for more information as warranted; (3) the reduction in paperwork; (4) elimination of unnecessary regulatory burdens and legal costs permits resources to be directed instead toward the prompt implementation of service; (5) the waiting period for processing applications may result in lost opportunities to a company; (6) the revisions will permit interlocking officials to assume their duties promptly; (7) regulatory delay stemming from the Commission's past procedures impedes carriers from investing in, and lending their expertise to, new communications ventures, which fosters economic inefficiencies and hampers the development of new services; and (8) the past process has had an especially negative impact upon small start-up carriers and service vendors which do not possess market power. In light of these comments supporting our own analysis, we believe that the proposed revision is an important step to accomplish the purposes of Section 212 in a more reasonable and expeditious manner than our past procedures.

9. However, we are mindful of the position of Ameritech, which cautions against a rigid adherence to the categories established in the *Competitive Carrier Rulemaking* proceeding in accomplishing the goals of Section 212. It states its belief that this scheme may have inconsistent results. It observes, in this regard, that interlocks between certain non-dominant carriers which compete may generate more concern as to possible anticompetitive conduct than would interlocks between certain dominant carriers which do not compete. We expect that such issues will be developed in a future NPRM. *See* n.9 *infra.*

10. While the scheme we have proposed might not achieve perfection in all circumstances, on balance and in light of the record herein, it will to a great extent accomplish a significant reduction in unnecessary regulation without undue risk to the public. As with other movements toward reduced regulation, these rules might not address, as Ameritech notes generally, the universe of potential harms from interlocking directorates and might be overly protective in some respects. We are prepared to revisit this issue as circumstances and our experience warrant. However, the potential for anticompetitive conduct from interlocks between non-dominant carriers is now so remote that individual Part 62 applications need not be used to prevent abuse. On the other hand, where dominant carriers are involved, the potential for abuse is much clearer. In the future, if abuses arise among non-dominant carriers, we can reimpose filing requirements, just as we may remove those imposed on dominant carriers.

Authority to eliminate Part 62 applications for positions upon certain categories of carriers

11. With the exception of U S West, which maintains that some form of applications process is mandated by Section 212, all of the commenting parties support the proposed rules. U S West believes that abandonment of the pre-filing requirement in favor of blanket approval for certain classes of carriers is not consistent with the language of Section 212 and with the Commission's interpretations of Section 212. In this regard it relies principally upon Commission statements about the mandatory nature of Section 212 and Commission decisions allegedly refusing to grant exemptions from filing Part 62 applications. It submits that the Commission's authority to remove individual Part 62 filing requirements for certain classes of carriers is of dubious legality and that the Commission should seek relief from Congress, as it did when it desired to liberalize the statute's application to commonly owned carriers in 1956.[4]

[4] U S West relies upon statements made by the Commission to Congress proposing a modification to Section 212 in 1956 as allegedly indicating recognition that the Commission could not deviate from an applications format. However, the Commission did not then address or interpret Section 212 as requiring that applications be filed in situations where interlocks between certain categories of carriers had been found, upon a proper record, not to harm public or private interests. Indeed, such a discussion or proposal would have been inappropriate since, as U S West concedes, the communications market in 1956 was substantially different from today's market. The Commission statements at the time of the 1956 amendment can be properly construed as seeking discretion to exempt commonly owned carriers from the application of Section 212's standard requiring applicants to show that no harm will flow from a proposed interlock. In contrast, in this proceeding we are not seeking to exempt applicants from the coverage of the statute or from application of its standard; rather, we propose to alter only the

However, U S West does concur with the Commission's basic premise that numerous situations exist where interlocking directorates are not contrary to the focus and purpose of the Act, and suggests that expedited processing of streamlined applications would be consistent with the requirements of the section.

12. Three other parties who discussed this issue[5] stated that the action proposed is consistent with the Commission's statutory authority for the following reasons: (1) grant of a blanket authorization between certain classes of carriers is an acceptable means of satisfying the Act's Section 212 mandate; (2) the Commission has great latitude in discharging its duties to proceed either by way of case-by-case determinations or by general rulemaking; (3) the FCC is merely shifting its procedures for enforcing Section 212 from an applications process to a complaints format, and there is no sound basis to read a prohibition against such a shift into the statute and thereby continue to impose unnecessary burdens upon both the applicants and the Commission; (4) the individual advance filing requirement is imposed not by Section 212, but by Part 62 of the Commission's Rules; and (5) U S West's reliance on the Congressional amendment of Section 212 thirty years ago is unpersuasive as to the Commission's power to shift its procedural requirements.

13. We reject U S West's argument regarding our legal authority. While the NPRM speaks in terms of forbearance from requiring Part 62 applications in certain circumstances, we are not forbearing from our regulatory responsibilities under Section 212. This section specifically provides that the "form and manner" of the showing required in order to obtain authorization to interlock is left to the Commission's discretion. In this regard, we stress that the application-filing requirement stems not from the statutory language but from Part 62. The NPRM proposed modification to the Rules only to substitute a more flexible and less burdensome regulatory mechanism, reflecting current marketplace considerations, for the applications process, where justified.[6] We did not propose to avoid executing and statutory requirement in Section 212.

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method by which Section 212's purpose can best be achieved given the changed circumstances in the current marketplace.

[5] Centel, Metro Mobile, and Telocator/Cellular.

[6] The agency is afforded great latitude to devise regulations to meet changing circumstances and to select the best manner of regulation so long as the regulation effectuates the statutory goals. *See* FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137-138 (1940); Permian Basin Area Rate case, 390 U.S. 747, 748 (1968); FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978); Western Union Telegraph Co. v. FCC, 674 F.2d 160 (2d Cir. 1982); Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 103 S. Ct. 2856, 2866 (1983); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851-52 (D.C. Cir. 1970); American Telephone and Telegraph Co. v. FCC, 572 F.2d 17, 26 (2d Cir 1978), *cert denied*, 439 U.S. 875 (1978); Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282, 284 (D.C. Cir. 1966); NAACP v. FCC, 682 F.2d 993,

14. We therefore hereby issue a blanket authorization allowing interlocks between carriers found by this Commission to be non-dominant and between cellular licensees operating in different geographic markets, since we find that these interlocks will not adversely affect the public or private interest. We will rely upon the interlocking directorate reporting requirement and our complaints process or independent investigation as the regulatory mechanisms to further ensure prompt action in effectuating Section 212's purpose for interlocking positions covered by this authorization.

Suggested elimination of additional categories of carriers from the Part 62 applications process

15. Nine parties[7] filed comments suggesting that the proposed elimination of Part 62 applications be extended to additional categories of carriers.[8] We note that a further reduction in the categories of carriers subject to the applications process may indeed pose no harm under Section 212. However, because the suggestions raised go considerably beyond the scope and analysis in the NPRM, we are not prepared to further expand the scope of our proceeding at this time. The record in this proceeding is inadequate to establish the legitimacy of claims that additional carriers, not yet found to be dominant or non-dominant, should be treated as such for purposes of Part 62. Nevertheless, it may well be that certain additional classes of carriers (see note 8, *supra*) should be relieved from individual compliance with Part 62 irrespective of their status in the *Competitive Carrier Rulemaking* based upon considerations such as competition in a relevant geographic area or submarket.[9] Of course, as additional categories of carriers are considered and are found to be non-

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999 (D.C. Cir. 1982); Computer and Communications Industry Association v. FCC, 697 F.2d 198, 212-14 (1982), *cert denied*, 103 S. Ct. 2109 (1983).

[7] Federal Express, Metromedia, Centel, SNET, Ameritech, M/A-COM, Kadison, Telocator/RCC, and Telocator/Cellular.

[8] These additional categories include: (1) international carriers not yet found to be non-dominant, especially start-up international carriers which do not possess market power; (2) international satellite carriers that offer international service solely by means of Intelsat's International Business Service or International Television Service; (3) common carriers in the Public Land Mobile Service; (4) Multipoint Distribution Service carriers with non-overlapping services areas; (5) interlocking directorates between cellular licensees and carriers engaged in non-cellular public mobile radio services and which are not in direct competition; and (6) interlocks between a dominant exchange company and its affiliates. No objections were raised to these proposals.

[9] For example, paging is a highly competitive industry in which entry at the federal level is virtually open. Thus, paging carriers are obvious candidates for blanket approval. We therefore will, in the near future, undertake a further notice of proposed rulemaking to consider modifying our Part 62 regulation of carriers not now included within the non-dominance rationale. The purpose of this further notice will be to explore the feasibility of

dominant, *i.e.*, without market power, they will come within the framework of our current Part 62 revisions. The Commission has already commenced proceedings proposing to treat international carriers and mobile service providers as non-dominant. *See International Competitive Carrier Policies*, CC Docket No. 85-107, FCC 85-107, released April 19, 1985, and *Preemption of State Entry Regulation in the Public Land Mobile Service*, CC Docket No. 85-89, FCC 85-147, released May 17, 1985.

Exemption of wireline cellular carriers from the applications process

16. In the NPRM, the Commission proposed to relieve cellular licensees operating in different geographic markets from the requirement of filing Part 62 applications, on the basis that the structure of cellular radio precludes competition between these licensees. Because cellular services are licensed by the Commission for expressly defined markets,[10] interlocking directorates between cellular licensees in these different markets should not diminish or affect competition.

17. The comments were generally supportive of this proposal. However, Metromedia, although favoring our proposed rule for non-wireline carriers, asserts that the Commission should retain the Part 62 filing requirement for the regional Bell holding companies' cellular carriers. It argues that applications should be required for interlocking directorates in these circumstances because: (1) the cellular subsidiaries have a "headstart" in the provision of service; (2) they will not operate in each market separately, but under common control with other cellular operations of the parent; and (3) the wireline parent controls essential facilities.

18. Four parties[11] filed comments relating to Metromedia's suggested treatment of interlocking directorates involving wireline cellular carriers. United Telecom and New Vector, a cellular service subsidiary of U S West, argue that Metromedia's "headstart" argument has no relevance in the context of Section 212. In this regard, New Vector asserts that: 1) the Commission made a conscious choice to speed cellular service to the public and that wireline operators should not now be encumbered by regulation that has no relevance to the competitive purposes underlying the "headstart" policy; 2) the Commission has resolved concerns about anticompetitive effects traceable to a wireline cellular company's affiliation with an operating telephone company (through common ownership by regional holding companies) in other proceedings; and 3) the Commission has already established significant protections in the cellular service

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exempting categories of carriers from Part 62 filing requirements regardless of their status under the Competitive Carrier Rulemaking, *supra*.

[10] *See* 47 C.F.R. §22.903.

[11] Centel, McCaw, United Telecom, and New Vector.

against anticompetitive conduct, including equal interconnection, disclosure of interconnection standards, and structural separation requirements. Further, New Vector states that commonly owned carries are already permitted to interlock, except that common officers are expressly prohibited between the Bell operating companies ("BOCs") and their cellular subsidiaries, citing 47 C.F.R. §22.901.

19. We have carefully considered the above arguments but are not persuaded that wireline cellular companies in different geographic areas which propose to have interlocking directorates should continue to be required to file Part 62 applications. The fact that a wireline cellular entity may have a "headstart" in constructing and operating in its market does not appear relevant to the imposition of Part 62 filing requirements. The Commission has already carefully considered the allegations of possible harm flowing from separate allocation of wireline and non-wireline frequencies and determined to permit early starts by wireline companies. *See Cellular Communications Systems*, 86 FCC 2d 469, 487-492 (1981), 89 FCC 2d 58, 69-75 (1982). We further provided for consideration of requests for a moratorium on wireline carrier cellular service upon demonstration of harm to the public interest resulting from a wireline carrier's "headstart." *Id.* at 86 FCC 2d 491, n.57 and 89 FCC 2d 72 and 74-75. Thus Metromedia's "headstart" argument does not compel retention of Part 62 filing requirements.

20. In addition, we do not believe that the possible anticompetitive conduct which could flow from interlocking directorates between a wireline cellular company and an affiliated exchange company, or from a regional holding company's cellular coverage in different markets, requires that wireline cellular companies in different markets must continue to file applications before they can have interlocking directorates, as we proposed.[12]

21. We have already provided a number of safeguards against harm stemming from this affiliation. All wireline carriers are required to provide reasonable interconnection to cellular systems, and every non-wireline cellular licensee has the right to interconnect with the landline network in the identical manner as a wireline cellular system. *See Cellular Communications Systems*, 89 FCC 2d 58, 81 (1982). In this regard, a wireline carrier is required to set forth, in its application for cellular service in an area where it provides landline service, exactly the

[12] We note that Metromedia's concern appears to be directed not toward our proposal but toward the interlock between the parent exchange carrier or holding company and its cellular subsidiary. We have not proposed in the NPRM to relieve dominant carriers, including exchange carriers, from filing under Part 62. Metromedia has put forward no reason not already considered by us in permitting provision of cellular service by wireline carriers to justify prohibiting these interlocks in the context of this NPRM.

manner in which its system will interconnect with the landline network with sufficient specification to enable a competitor to design its system in the same fashion. *Id.*, and 47 C.F.R. §22.913(a)(9). Further, the BOCs may only provide cellular service subject to structural separation conditions, including separate officers. *See* 47 C.F.R. §22.901. Structural separation, imposed by specific Commission order and the Rules, would not be altered by any more general relaxation of Part 62 filing requirements. In determining not to impose these structural separation requirements on other exchange carriers offering cellular service, the Commission found that formal complaint procedures, in addition to requirements for fair and reasonable interconnection, were sufficient to protect against predatory pricing and other abuses by their wireline cellular carriers. *See Cellular Communications Systems*, 89 FCC 2d 58, 78 (1982). Finally, the BOCs are not prohibited from having common directors with their cellular subsidiaries. Under Section 212, interlocking directorates may be permitted where common ownership is demonstrated, without regard to a finding of adverse affect upon public or private interests.[13]

22. In summary, all of these factors, coupled with the reporting requirement adopted herein, and the availability of the complaints process and independent Commission investigation to prevent any anticompetitive practices, weigh against the imposition of Part 62 filing requirements for interlocks between wireline cellular carriers in different geographic markets. If circumstances require, filing requirements can be re-imposed for this, or any other, category of carrier.

Application of Part 62 to positions with parent or holding companies of common carriers

23. In the NPRM we sought to clarify those situations in which the parent or holding company of a carrier must comply with the requirements of Part 62. We did so by proposing to add subsection (d) to Section 62.2 of our Rules, which would define the term "carrier" to include the parent or holding company of a carrier subject to the Act.

24. Six parties commented on this issue.[14] None of them questioned the legitimacy of our concern that Section 212 could be circumvented through a carrier's adoption of a parent or holding company structure. However, these parties generally questioned our authority to bring parent or holding companies of carriers subject to the Act within the ambit of Section 212 by including such companies in the definition of "carrier".

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[13] Commonly-owned companies barred from sharing officers have been permitted to have interlocking directors. *See, e.g.*, Application of John A. Johnson, 48 FCC 2d 529 (1974); CML Satellite Corporation, 51 FCC 2d 14 (1975); GTE-Telenet Merger, 72 FCC 2d 91 (1979); 47 C.F.R. §64.702.

[14] United Telecom, Ameritech, BellSouth, U S West, Telocator/Cellular, and ITT.

Commenters suggested that we might achieve our goal by other means. For example, U S West stated that we should employ our "inherent power to pierce corporate form" upon an appropriate record. Ameritech notes that the Commission already possesses authority under Sections 215, 218, and 219 of the Act to obtain required information from persons controlling carriers.

25. We disagree with those parties who suggest that a corporation's holding company status automatically exempts it from classification as a common carrier under the Communications Act. However, a re-examination of our goal in this proceeding has convinced us that it is unnecessary to define parent and holding companies as carriers for purposes of this proceeding. Therefore, we intend to modify our earlier proposal in a manner which makes it unnecessary to either confront or decide the jurisdictional issue raised by the parties.[15]

26. The primary goal of this proceeding is to remove unnecessary regulatory burdens. NPRM at 2. On the other hand, it is clear that interlocks through holding companies could generate substantial anticompetitive effects.[16] Parent and holding companies could be expected to exert significant control over their carrier subsidiaries. Against this background, we believe it is necessary to impute the status of their subsidiary carriers and, thus, apply the requirements of Part 62 to parent and holding companies in order to discharge our responsibilities under the Act. To do otherwise would allow the statutory purposes of Section 212 to be circumvented through the use of separate corporate entities. Under such circumstances, we have ample authority to "look through corporate form and treat the separate entities as one and the same for purposes of regulation." *General Telephone of the Southwest v. United States*, 449 F.2d 846, 855 (1971) and cases cited therein.

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[15] We considered this claim most recently in connection with our review of the capitalization plans for certain subsidiaries of the seven regional Bell operating companies (RBOCs). Capitalization Plans for the Furnishing of Customer Premises Equipment and Enhanced Services, FCC 85-28, released February 4, 1985, at 9-10. We found it unnecessary to decide the question because, as in the instant proceeding, other grounds exist for the exercise of our jurisdiction.

[16] For example, we would be concerned if a director of a holding company with a controlling interest in a dominant exchange carrier sought to become a director of an unaffiliated interexchange carrier. It is clear that in such a situation carrier activities could be manipulated in an anticompetitive manner, including preferential treatment by the exchange carrier of its interlocked carrier. To a lesser degree, anticompetitive effects could arise out of a situation where a person sought positions on the boards of two companies, each of which held a controlling interest in a dominant carrier. Here, of course, a possible danger includes the ability of the entities to jointly wield increased market power. In both examples, the real and potential anticompetitive practices that we seek to deter pursuant to Section 212 would be placed beyond our review due to the presence of a holding company structure.

27. Fulfilling our responsibilities under Section 212 does not require us to compel Part 62 applications from parent or holding companies of carriers in every instance where such companies are involved in an interlock. Accordingly, we are imputing carrier status simply to prevent a particular corporate form from being used as a vehicle to circumvent the Act. As this can only occur where a parent or holding company has the ability to control the actions of its carrier subsidiary, we will impute carrier status only where such control is present.[17]

28. Once carrier status has been imputed to a parent or holding company, we will limit the degree to which our Part 62 rules are applied to them according to the likelihood that the proposed interlock holds the potential to generate competitive harm. As interlocks involving carriers with market power hold the most potential for such harm, we will require applicants seeking positions upon parent or holding companies to submit Part 62 applications only when authorization is being sought under subsection 62.11 and where an interlock involves a dominant carrier. If no dominant carrier is involved in an interlock, a parent or holding company with imputed carrier status will be subject only to the reporting requirements of Part 62.[18]

Connecting Carriers

29. In the NPRM, the Commission interpreted Section 212 as applicable to connecting carriers. Section 212 makes it unlawful for a person to occupy the position of officer or director of more than one *carrier subject to this Act* without authorization. We noted that this language is not limited to carriers subject to full Title II regulation ("fully subject carriers").[19] Moreover, the statute applies to the applicant and the interlocking position, but not directly to the carrier itself.

30. Four parties filed comments relating to connecting carriers.[20] All four oppose the Commission's conclusion that Section 212 authorization

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[17] For this purpose, we adopt the 50% ownership factor set forth in Section 212 of the Act for the requisite control.

[18] We reject suggestions that we should rely exclusively upon our authority under Sections 215, 218, and 219 of the Act to acquire this information. In most instances, information gathering of this nature is an after-the-fact measure. More importantly, to rely exclusively upon this kind of disclosure is not an adequate substitute for our prior approval under Section 212 which allows us to deal swiftly and effectively with arrangements raising potential anticompetitive consequences.

[19] Under Section 2(b)(2), 47 U.S.C. §152(b)(2), connecting carriers, *i.e.*, carriers engaged in interstate or foreign communication solely through physical connection with another unaffiliated carrier, are not subject to full regulation under Title II of the Communications Act. *See, e.g.*, Declaratory Ruling on the Application of §2(b)(2) of the Communications Act of 1934 to Bell Operating Companies, CC Docket No. 85-197, FCC 85-320, released June 20, 1985.

[20] Centel, McCaw, USTA, and United Telecom.

requirements are applicable to connecting carriers. Centel, USTA, and United Telecom argue that the plain language of Section 2(b)(2) makes it clear that connecting carriers are exempt from all sections of Title II of the Communications Act except for Sections 201-205 and 224.[21] They maintain that a "carrier subject to this Act", as used in Section 212, means "fully subject carriers", *i.e.*, carriers not exempt under Section 2(b)(2). They point out that, while Section 212 is not limited by its language to exclude connecting carriers, neither are the other sections of Title II.[22] Centel, USTA, and United Telecom also dispute the Commission's conclusion that applying Section 212 to connecting carriers does not enlarge the scope of the Commission's regulation of connecting carriers. Centel and USTA argue that, while the person seeking an interlocking position is the one who must file, it is the nature of the carrier that requires the filing, and it is the carrier which feels the impact of the authorization process.

31. Even if the term "carrier subject to this Act" in Section 212 does not include connecting carriers, our Section 218 powers are clearly broad enough to enable us to require officers or directors of fully subject carriers to report positions such persons acquire with connecting carriers.[23] We have decided that reports of such interlocking relationships should be required because such information is likely to be at least as useful as reports of interlocking relationships among non-dominant carriers. The submission of a required report with respect to interlocking relationships with connecting carriers will be deemed to satisfy any

[21] *But see* Com Services Inc. v. Murraysville Telephone Co., FCC 85-25, released February 4, 1985, *recon. pending*, in which the Commission concluded that connecting carriers are liable for damages under Sections 206 and 207 of the Act.

[22] The one exception is Section 203 which, according to Centel, is necessary since the specific language of Section 2(b)(2) makes Section 203 applicable to 2(b)(2) carriers.

[23] Some powers and requirements that are expressed in Sections 206-223 are or may be applicable to connecting carriers in order to ensure the achievement of our responsibilities under Sections 1 and 201-205 of the Act. We have interpreted the Act as implicitly permitting us to apply at least some of the provisions of Sections 206-223 to connecting carriers that relate to our authority under Sections 201-205. *See, e.g.*, Com Services v. Murraysville Telephone Co., *supra*. Against this background, we interpret Section 1 of the Act and our Section 4(i) powers as implicitly permitting us to apply at least some of the provisions of the 1934 Act where related to our authority under Sections 201-205. Courts have recognized the legitimacy of this position. *See, e.g.*, GTE Service Corporation v. FCC, 474 F.2d 724 (2d Cir. 1973) (rejecting argument that the Computer I maximum separation requirements could not be imposed on connecting carriers); Lincoln Telephone and Telegraph Co. v. FCC, 659 F.2d 1092 (D.C. Cir. 1982) (holding that a connecting carrier could be required to file tariffs pursuant to Section 4(i) authority). The Section 212 prohibition of unauthorized interlocks does not, however, appear to be so essential to the achievement of Section 1 goals or the enforcement of Sections 201-205 that we would be obliged to impose such a requirement pursuant to Section 4(i), 47 U.S.C. §154(i), if Section 212 did not exist.

authorization requirement that might be applicable. In view of the ambiguity in the statutory language, persons who hold interlocking positions in two or more connecting carriers are also encouraged to submit reports, but we do not expect to initiate any enforcement proceedings against persons who do not choose to submit such reports at the present time.

Reporting Requirement

32. In order to facilitate the complaints process, we proposed that the title of the position held for each carrier represented be reported to the Commission within one month of assumption of office, and annually thereafter.[24] Seven parties commented on this proposal, suggesting that it be modified or eliminated.[25] While agreeing that the imposition of some simple reporting requirement with regard to interlocking directorates may be desirable in order to track interlocks among entities for whom separate Part 62 applications will no longer be required, BAMS, Bell Atlantic, and ITT suggested that those persons holding interlocking positions pursuant to 47 C.F.R. §62.25 (upon a finding of common ownership) should not have to file separate reports because the information is already a matter of public record. Bell Atlantic also noted that there is no need for additional annual reports for interlocks involving dominant carriers, which remain subject to the Part 62 applications process and for which a change in status must be reported. BAMS recommends that annual reporting will be sufficient for entities for whom separate reporting would still be required. Centel also supports annual reporting, alternatively suggesting that reporting should be on a semi-annual basis. Metromedia, Centel, United Telecom, and Telocator/Cellular suggest that, since carriers currently file an annual FCC report Form 430 ("Common Carrier and Satellite Radio Licensee Qualification Report"), which lists the carrier's officers and directors, an interlocking directorate report is unnecessary.

33. We believe that, except as to interlocking directorates between entities which remain subject to the applications process, the reporting requirement should be retained as proposed. We note that the Form 430 is insufficient to track interlocking directorates; it is filed annually and requires a listing only of the filer's own officers and directors and does

[24] Because use of "one month" as the reporting interval could result in possible uncertainty, we have modified the rules to provide for a more precise interval of 30 days. In addition, because any change in the status of information provided pursuant to Part 62 (including termination of the reported interlock) must be reported pursuant to 47 C.F.R. §62.24, we believe it is both unnecessary and cumulative to require an annual reporting pursuant to 47 C.F.R. §62.26. We have therefore deleted this requirement from the final rules.

[25] Bell Atlantic, Metromedia, Centel, BAMS, United Telecom, Telocator/Cellular, and ITT.

not disclose interlocking arrangements. For purposes of ensuring that the goals of Section 212 are met, and of protecting against any harm which might flow from interlocking directorates, we believe that these arrangements should be revealed promptly. This will allow both the Commission and the public to become aware of specific interlocking arrangements soon after they arise, and thus facilitate complaints and independent Commission action to prevent abuses. While our experience may reveal that the requirement that interlocking directorates be reported within 30 days is unnecessary and is disclosing no situations warranting correction, it is better to err on the side of caution at the outset. As our experience with the new rules grows, we may consider lengthening the reporting interval or even eliminating this requirement.

34. However, we see merit in the suggestions of the commenting parties that separate reporting is unnecessary and duplicative from individuals which remain subject to Part 62's applications process. We will therefore modify subsection 62.26 to except from its coverage those who file for positions pursuant to proposed 47 C.F.R. §§62.1(a), 62.1(b), and 62.25.

Miscellaneous Suggestions

35. The parties have suggested several areas in which the proposed rules should be clarified, as well as areas where regulatory burdens may be further reduced. For example, Federal Express recommends that the Commission make Part 62 more free-standing by eliminating cross-reference to Part 61. We will adopt this suggestion in part, by eliminating reference to specific subsections of Part 61, thereby obviating the need for revision of Part 62 whenever the relevant subportions of Part 61 are revised. We also believe that the language of subsections 62.1(a) and (b) should be clarified to eliminate confusion regarding when Part 62 applications must be filed. Telocator/Cellular, among others, has commented that the language originally proposed leaves doubts as to our treatment of carriers we have not yet found to be dominant or non-dominant. We will clarify the language accordingly. (See subsections 62.1(a) and (b) of the new Rules in Appendix B.) In addition, to the extent the NPRM may have generated confusion, we clarify that authority to hold interlocking directorates of commonly owned carriers, as defined in 47 C.F.R. §62.2(c), need only be obtained where a carrier found to have market power and therefore defined as a dominant carrier under 47 C.F.R. §61.12(c), or a carrier not yet found to be dominant or non-dominant, is involved. Because we have found that interlocks between non-dominant carriers are unlikely to cause harm to public or private interests, it is unnecessary to make a determination of common ownership to permit interlocks among such entities.

36. Finally, Centel recommends that determinations of common ownership for cellular radio systems be made by the Commission when it issues a construction permit to a cellular carrier which is commonly owned by another carrier, thus obviating the need for a separate application seeking such a finding. It advises that applications for authority to construct cellular radio systems contain all information regarding ownership currently required by Part 62. We believe the course of action Centel recommends would reduce a number of unnecessary applications, and we therefore will adopt this suggestion. In the future, applicants can request a finding of common ownership under Part 62 as part of their radio licensing authority, so long as all necessary Part 62 information is supplied.[26]

Regulatory Flexibility Act - Final Analysis

37. *Need for and Purpose of Rules.* The Commission proposed the subject rules because of the need to eliminate unnecessary rules and regulations and to improve application procedures with respect to Part 62 of the Commission's Rules.

38. *Comments.* No comments were received that directly addressed the initial regulatory flexibility analysis.

39. *Alternatives Considered.* As noted in our initial flexibility analysis, the Commission's alternative would be to retain unnecessary rules and to refrain from improving its application procedures. We concluded that such alternatives are inconsistent with the public interest.

40. *Paperwork Reduction.* The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified requirements or burden upon the public. Implementation of any new or modified requirement or burden will be subject to approval by the Office of Management and Budget as prescribed by the Act.

41. *Legal Basis.* The authority for this rulemaking is contained in Sections 1, 4(i), 4(j), 201-209, 212, 218, 301, 303, 309, and 403 of the Communications Act of 1934, as amended, and Sections 553 of the Administrative Procedure Act, 5 U.S.C. Section 553.

42. Accordingly, IT IS ORDERED, that Part 62 of the Commission's Rules and Regulations is amended as specified in Appendix B to this Order, effective thirty days after publication of this First Report and Order in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

[26] In the event the radio licensing application is contested for this reason, we retain authority to act separately upon the Section 212 authorization.

APPENDIX A

Parties Filing Comments:

Centel Corporation ("Centel")

CBS Inc. ("CBS")

Kadison, Pfaelzer, Woodard, Quinn & Rossi ("Kadison")

Pepper, Hamilton & Scheetz ("Pepper")

M/A-COM, Inc. ("M/A-COM")

Federal Express Corporation ("Federal Express")

United States Telephone Association ("USTA")

U S West, Inc. ("U S West")

The Bell Atlantic Telephone Companies comprising The Bell Telephone Company of Pennsylvania, The four Chesapeake and Potomac Telephone Companies, The Diamond State Telephone Company, and New Jersey Bell Telephone Company ("Bell Atlantic")

BellSouth Corporation on behalf of itself, South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company ("BellSouth")

The Southern New England Telephone Company ("SNET")

Bell Atlantic Mobile Systems, Inc. ("BAMS")

The Radio Common Carrier Division of Telocator Network of America ("Telocator/RCC")

McCaw Cellular Communications, Inc. ("McCaw")

Northeast Pennsylvania Cellular Telephone Company, Harrisburg Cellular Telephone Company, and Allentown Cellular Telephone Company ("Northeast Cellular")

United Telecommunications, Inc. ("United Telecom")

Metro Mobile CTS, Inc. ("Metro Mobile")

The American Information Technologies Corporation ("Ameritech")

The Cellular Telecommunications Division of Telocator Network of America, Inc. ("Telocator/Cellular")

Metromedia, Inc. ("Metromedia")

Parties Filing Replies:

ITT Communications Services, Inc. ("ITT")

New Vector Communications, Inc. ("New Vector")

United Telecom

Ameritech

Telocator/Cellular

APPENDIX B

Part 62 of Chapter 1 of Title 47 of the Code of Federal Regulations is revised in its entirety as follows:

PART 62 - APPLICATIONS TO HOLD INTERLOCKING DIRECTORATES

GENERAL

Section

62.1 Scope and Method of securing authorization.

62.2 Definitions.

62.2(a) Officer or director.

62.2(b) Interlocking director.

62.2(c) Commonly owned carriers.

62.3 Removed.

CONTENTS OF APPLICATIONS

§62.11 Information required.

§62.12 Information required for findings of common ownership.

ADMINISTRATIVE REGULATIONS

§62.21 Signature.

§62.22 Form of application; number of copies; size of paper; fees; etc.

§62.23 Additional or different positions with same companies.

§62.24 Change in status; Commission to be informed.

§62.25 Authorization to hold interlocking directorates in commonly owned carriers.

§62.26 Reporting requirements.

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply sec. 212, 48 Stat. 1974, as amended; 47 U.S.C. 212.

SOURCE: 28 FR 13228, Dec. 5, 1963, and _____, unless otherwise noted.

GENERAL

§62.1 Scope and Method of securing authorization.

No person may hold the position of officer or director in more than one carrier subject to the Communications Act of 1934, as amended, unless duly authorized to do so pursuant to the regulations set forth in this part:

(a) Application must be made to hold interlocking positions upon more than one carrier subject to the Act where any carrier sought to be interlocked has been found by the Commission to have market power and is therefore defined as a dominant carrier under 47 C.F.R. Part 61, or where any carrier has not yet been found to be non-dominant, except for cellular licensees in different geographic markets. For purposes of this subsection and §62.11, application must be made for positions upon the parent or holding company of a carrier subject to the Act where the interlock involves a dominant carrier.

(b) Persons seeking positions as officers or directors of cellular radio licensees in different geographic markets or of carriers which have been found to be non-dominant are authorized to serve in those capacities without making application to this Commission, except that

applications shall be filed for positions upon non-dominant and/or cellular carriers, if interlocks are sought between such carrier(s) and any carrier found to be dominant under 47 C.F.R. Part 61, or any carrier not yet found to be non-dominant.

§62.2 Definitions.

As used in this part, the term:

(a) "Officer or director" shall include the duties, or any of the duties, ordinarily performed by a director, president, vice president, secretary, treasurer, or other officer of a carrier, such as general counsel, general solicitor, general attorney, comptroller, general auditor, general manager, general commercial manager, chief engineer, general superintendent, general land and tax agent, or chief purchasing agent;

(b) "Interlocking director" shall mean a person who performs the duties of "officer or director" in more than one carrier subject to the Communications Act of 1934, as amended; and

(c) "Commonly owned carriers" shall mean two or more carriers, one of which directly or indirectly owns more than 50 percent of the stock of the other carrier or carriers, or 50 percent or more of whose stock is owned directly or indirectly by the same person.

CONTENTS OF APPLICATIONS

§62.11 Information required.

Each application shall include the following information:

(a) The full name, occupation, and business address of the applicant.

(b) With respect to each carrier of which the applicant is an officer or director or seeks to be an officer or director, indicate the applicant's position, the nature of the applicant's duties, the date applicant assumed or will assume such duties, and specify every common carrier in which applicant has a financial interest, together with a description thereof.

(c) Provide a full explanation of the reasons why grant of the authority sought will not adversely affect either public or private interests. In this regard, address whether grant of the permission requested could result in anticompetitive conduct by carriers covered by the request or by carriers upon which applicant already acts as officer or director, diminution in the independence of each carrier, or potential conflicts of interests on the part of common directors or officers in violation of their fiduciary duties. Set forth any steps which will be taken by the applicant to safeguard against such occurrences.

(d) State whether the applicant has, as director or officer of any carrier subject to the Act, received for his own benefit, directly or indirectly, any money or thing of value in respect of negotiation, hypothecation, or sale of any securities issued or to be issued by such carriers, or has shared in any of the proceeds thereof, or has participated in the making or paying of any dividends of such carrier from any funds properly included in capital accounts.

§62.12 Information required for findings of common ownership.

Each application shall state the following:

(a) The name and address of the carrier which seeks a finding that it owns more than 50 percent of the stock of another or other carriers; or the name and address of the person who seeks a finding that he owns 50 percent or more of the stock of two or more carriers; and

(b) The name and address of each carrier with respect to which the finding is sought by the applicant; for each such carrier, the total number of outstanding shares of stock of each category (common, preferred, etc.); the voting rights of each category; for each category, the number of shares directly or indirectly owned by the applicant and the percentage of the total number of outstanding shares in each category so owned. Where ownership is indirect, the

applicant shall submit information regarding each intermediate entity involved to show that the applicant is the owner of the stock described.

ADMINISTRATIVE REGULATIONS

§62.21 Signature.

(a) The original application filed pursuant to §62.11, and any amendment or change in status, shall be signed by the individual applicant.

(b) The original application filed pursuant to §62.12 should be signed by the applicant, if an individual, or by a duly authorized officer, if a company or corporation.

§62.22 Form of application; number of copies; size of paper; fees, etc.

The original application and two copies thereof shall be filed with the Commission. Each copy shall bear the dates and signatures that appear on the original and shall be complete in itself, but the signatures on the copies may be stamped or typed. The application shall be submitted in typewritten or printed form, on paper not more than 8 ½ inches wide and not more than 11 inches long, with a left-hand margin of approximately 1 ½ inches, and if typewritten, the impression must be on only one side of the paper and must be double spaced. Each such application shall be accompanied by the fee prescribed in Subpart G of Part 1 of this chapter.

§62.23 Additional or different positions with same companies.

If an applicant has been authorized by the Commission upon application filed pursuant to §62.11 to hold certain positions as officer or director of certain carriers and is subsequently elected or appointed, or anticipates election or appointment, to additional or different positions with one or more of the same carriers, he may report the change in the manner and form provided in §62.24 relating to "change in status". Authorization for the holding of such additional or different positions shall be deemed granted as of the 15th day following the filing of such report, unless within that time the Commission shall call upon the applicant for additional information or for the filing of a formal application.

§62.24 Change in status; Commission to be informed.

Should any change occur in the status as reported under this Part, the applicant shall report such change to the Commission within 30 days after such change occurs.

§62.25 Authorization to hold interlocking directorates in commonly owned carriers.

After the Commission has found upon application filed pursuant to §62.12 that two or more carriers are commonly owned carriers, any duly designated person is authorized hereby to be an interlocking director of two or more such carriers. However, the authorization herein granted to any interlocking director shall be automatically cancelled with respect to any position held in any such carrier which at any time ceases to be a commonly owned carrier, without notice thereof by the Commission, either to the interlocking director, to the carrier, or to the person upon whose application a finding of common ownership was made. In event of such cancellation, the interlocking director shall immediately cease and desist from acting in that capacity with respect to the carrier which has ceased to be a commonly owned carrier until such time as appropriate authorization is obtained pursuant to this Part.

§62.26 Reporting requirements.

All persons holding interlocking positions on more than one carrier subject to the Act, including positions upon a parent or holding company of a carrier, shall report to the Commission within 30 days of assumption of the interlocking positions, including the title of the position(s) held for each carrier (or holding or parent company of a carrier) represented. This subsection shall also apply to positions upon connecting carriers as defined in 47 U.S.C.

§153(u), so long as the interlock with the connecting carrier(s) also involves positions upon a fully subject carrier. This subsection shall not apply to persons who must file applications pursuant to §§62.1(a), 62.1(b), and 62.25 hereof.

Contract Filing With FCC
Network Affiliation Agreement

Commission eliminates requirement that radio licensees file copies of their network affiliation contracts with the Commission. Commission felt that with over 100 available radio networks, no one program source could have significant market power over any individual radio station. However, given that there are only a few major national television networks, Commission retains filing requirement for television licensees who affiliate with national networks.

—*Amendment of Part 73*
MM Docket No. 85-5

FCC 85-370

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 73 of the Commission's Rules concerning the filing of Network Affiliation and Transcription Contracts	MM Docket No. 85-5

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 12, 1985; Released: July 22, 1985

BY THE COMMISSION: COMMISSIONER RIVERA CONCURRING IN PART.

1. By this *Report and Order*, we are eliminating the requirement that radio stations and certain television stations file network affiliation and transcription contracts with the Commission. We are, however, retaining the filing requirement for television stations that are affiliated with national networks. In addition, we are terminating this proceeding.

Background

2. Section 73.3613(a) of the Commission's rules requires that each licensee or permittee of a commercial or non-commercial AM, FM, TV or international broadcast station file all network affiliation contracts,

agreements or understandings with the Commission.[1] In addition, any cancellation or change in the status of such contracts must be filed. Transcription contracts that specify an option time are also required to be submitted to the Commission.

3. On January 7, 1985, the Commission adopted a *Notice of Proposed Rule Making (Notice)* proposing to eliminate Section 73.3613(a) of the rules.[2] In the *Notice,* the Commission stated that the costs and burdens of filing the affiliation contracts now appear to outweigh the benefits of having this information at hand. The Commission indicated that over 3800 licensees presently file copies of their contracts with the Commission each year and that this filing requirement places a paperwork burden of approximately 2500 workhours on the industry. The Commission noted that the contracts have become relatively standard in nature and that it has not made significant use of this information in its recent deliberations. In this regard, the Commission stated that the public interest might be better served by conducting special *ad hoc* studies of network affiliation matters, as needed, rather than require the continued filing of this information. The *Notice,* therefore, requested comment on the general proposal to eliminate the filing of this information.

4. Nevertheless, the Commission did recognize that there may be substantial benefits in having this information available for public inspection. The Commission sought comment on alternative approaches that would permit public scrutiny of this information. The Commission indicated that one such approach would be to require that the affiliation and transcription contracts be available at the broadcast station as part of the public inspection file.

5. Five comments and four reply comments were filed in response to the *Notice.*[3]

Discussion

6. Most commenters favor retention of the filing requirement in some form. The National Radio Broadcasters Association (NRBA) states that the contracts contain essential information as to rates and other matters relating to the activity in the marketplace. Without this information,

[1] The rules require the filing of all network affiliation contracts, agreements and understandings between TV broadcast or low power TV stations and a national, regional or other network. For commercial AM and FM stations, this information need be filed only where the network normally furnished programming to affiliated stations at least 5 days each week during 8 months or more of the year.

[2] 50 FR 2596 (Published January 17, 1985).

[3] National Public Radio, National Radio Broadcasters Association, Storer Communications, Inc. and ABC Television Affiliates Association filed comments in this docket. ABC Television Affiliates Association, Media Access Project, Westinghouse Broadcasting and Cable, Inc. and Fisher Broadcasting, Inc. filed reply comments. WATH, Inc. filed late but their comments were accepted.

broadcasters would be at a competitive disadvantage when facing networks in negotiations, according to NRBA. The ABC Affiliates Association (ABC Affiliates) and Westinghouse Broadcasting and Cable, Inc. (Group W) contend that the contract information enhances competition between the networks and affiliates and that this was the primary reason for allowing public inspection of the contracts in 1969.[4] The ABC Affiliates further state that the existence and availability of accurate information is necessary in order for the market to function at its highest level of efficiency. ABC Affiliates directed their comments only to television affiliation contracts. They took no position on radio affiliation contracts but recognized that an analysis of the regulatory costs and benefits of the rule as applied to radio could yield a different conclusion than for television. The Media Access Project (Media) favors retention of the filing requirement to insure that network practices do not adversely affect the ability of licensees to operate in the public interest. Media states that the cost of complying with this regulation is *de minimus* since it only requires the filing of copies of documents already in existence. Media also believes that the Commission should require that the affiliation contracts be required to be made part of the station's public file to permit local listeners and organizations to inspect this information.

7. Storer Communications, Inc. (Storer) claims that the continued filing of the affiliation contracts is not unduly burdensome on the Commission or its licensees. Storer states that the Commission is the only central source of this information and that the burden of this regulation is minimal compared to the costs that would be incurred to travel from city to city to inspect individual files. Fisher Broadcasting Inc. (Fisher), states that keeping the contract filing requirement is more cost effective than Commission *ad hoc* studies. Fisher did, however, support eliminating the requirement for filing transcription contracts.

8. WATH, Inc. (WATH) supports deletion of the filing requirement. WATH states that elimination of this requirement would cut costs for licensees and the Commission. With less "paperwork" requirements, WATH feels that they could put more time into service to their listening area. Further, WATH suggests that the public has no use for such documents and that the Commission has other means and resources that could provide more meaningful and accurate information.

9. After reviewing the record in this proceeding, we concur with the majority of the commenters that the information provided by the network affiliation and transcription contracts may be valuable to affiliates in their negotiations and that the public availability of this information may potentially serve to enhance competition. However, as we stated in the *Notice,* the Paperwork Reduction Act and the Regulatory Flexibility Act

[4] *See Report and Order,* Docket No. 14710 (34 FR 5946) May 1, 1969.

impose substantial responsibilities on the Commission to ensure that the benefits of continued governmental regulation outweigh the costs associated with such regulation.[5] In this regard, we believe that the contract filing requirement for radio station licensees is no longer justified. There are presently over 3400 radio stations that are affiliated with one or more of the over 100 radio network organizations. Radio stations, therefore, have a significant number of program sources and choices in addition to local origination of programming. Given this fact, we find that it is unlikely that any one program source could exercise undue influence over any particular radio station. Accordingly, we believe that the requirement for filing network affiliation and transcription contracts by radio broadcast licensees is unnecessary.

10. With respect to television licensees, we believe that the requirement to file national network affiliation contracts should be retained at this time for stations affiliated with national networks. The number of national network organizations and program sources is still more limited for television than for radio. More importantly, the amount of national network programming carried by each individual television station is, in general, considerably more than that carried by a network affiliated radio station. Therefore, we believe that there can be significantly more dependence of the television station on the national network for programming and that closer scrutiny of national network/affiliate relationships is warranted at this time.[6] Accordingly, we will retain the requirement that national network affiliation contracts be filed with the Commission.[7]

11. For non-national television networks, we believe that the situation more closely parallels that of radio and that the filing requirement can be eliminated. In general, regional and other non-national networks do not provide the same quantity of programming to individual television stations as is the case with stations associated with the national networks. Therefore, we conclude that the filing requirement can be eliminated. Similarly, we see no need to retain the filing requirements for transcription contracts and contracts for the supplying of videotape recordings

[5] 44 U.S.C. Section 3501 *et seq.* and 50 U.S.C. Section 601 *et seq.*

[6] *See Review of Commission Rules and Regulatory Policies Concerning Network Broadcasting by AM and FM Broadcast Stations*, 63 FCC 2d 674, 690 (1977), where the Commission explained that its rules governing network-affiliate relations were based on its concern that a licensee has an affirmative duty to choose independently all programming for broadcast and, thus, the networks should not place unreasonable restraints on the licensee's ability to select programming.

[7] For the purposes of this filing requirement, we will use the definition of a national network contained in Section 73.658(j)(4). Under this definition, the term network means any person, entity or corporation which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states.

which specify an option time (Sections 73.3613(a)(5) and (a)(6)) and will eliminate these provisions of our rules.

12. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need for and purpose of the rules.

The Commission has decided to retain the requirement that television licensees file national network affiliation contracts with the Commission, but has eliminated this requirement for radio station licensees. The number of national network organizations and program outlets is more limited for television than for radio. Moreover, the amount of network programming carried by individual TV stations is greater than that carried by network affiliated radio stations. Therefore, the potential for any one network organization to exercise undue influence over an affiliate is greater for a television station than for a radio station. The Commission believes that continued scrutiny of the television national network/affiliate relationship is therefore warranted.

II. Summary of issues raised by the public comments in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result.

A. *Issues Raised.* No issues or concerns were raised specifically in response to the initial regulatory flexibility analysis. However, by retaining the filing requirement for television stations, approximately 600 network affiliates will continue to file copies of their national affiliation agreements with the Commission. Approximately 3400 radio stations affiliated with networks will no longer have to file their contracts with the Commission.

B. *Assessment.* None required.

C. *Changes made as a result of such comments.* None.

III. Significant alternatives considered and rejected.

The Commission considered requiring that licensees insert copies of their affiliation contracts in their public files in lieu of filing copies with the Commission. Since the Commission is retaining the requirement that television licensees file their national affiliation contracts with the Commission and that radio licensees will no longer have to file at all, the Commission rejected that alternative.

13. Authority for amending the rules is contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

14. Accordingly, IT IS ORDERED, that Part 73 of the Commission's Rules ARE AMENDED as set forth in Appendix A, effective July 22, 1985.

15. IT IS FURTHER ORDERED, that the Secretary shall cause a copy of the *Report and Order,* including the regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164. 50 U.S.C. §601 *et seq.*) (1980).

16. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix A

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 73 - Radio Broadcast Services.

1. The authority citation for Part 73 continues to read as follows:

Authority: Secs. 4 and 303, 48 Stat. 1066, as amended; 47 U.S.C. 154, 303. Interpret or apply Secs. 301, 307, 48 Stat. 1081, 1082, as amended, 1083 as amended, 47 U.S.C. 301, 303, 307. Other statutory and executive order provisions authorizing or interpreted or applied by specific sections are cited to text.

2. Section 73.3613, is amended by revising subparagraph (a)(1), removing subparagraphs (a)(2), (a)(5) and (a)(6); and marking them reserved to read as follows:

§73.3613 Filing of contracts.

* * * * *

(a) * * *

(1) All network affiliation contracts, agreements, or understandings between a TV broadcast or low power TV station and a national network. For the purposes of this paragraph the term network means any person, entity or corporation which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states; and/or any person, entity or corporation controlling, controlled by, or under common control with such person, entity or corporation.

(2) [Reserved]

* * * * *

(5) [Reserved]

(6) [Reserved]

* * * * *

Community, Qualifications
Suburban Community 307(B) Issue

In an AM proceeding involving a choice of granting three separate and distinct communities their first local outlet or one community its first local outlet, Review Board held that Section 307(b) favored grant of three applications notwithstanding that total population of three winning communities was substantially less than losing community. —*Archilla-Marcocci Spanish Radio Co.*
MM Docket No. 84-49

FCC 85R-63

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Archilla-Marcocci Spanish Radio Company Annandale, Virginia	MM Docket No. 84-49 File No. BP-830121AD
Martha Hahn and Philip Y. Hahn Purcellville, Virginia	MM Docket No. 84-50 File No. BP-830121AF
Vernon H. Baker d/b/a Rural Radio Service Earlysville, Virginia	MM Docket No. 84-51 File No. BP-830121AG
Edward A. Baker /d/b/a Bayshore Communications Denton, Maryland	MM Docket No. 84-52 File No. BP-830121AI
For Construction Permit	

Appearances

James M. Weitzman, Bruce A. Eisen and *Allan G. Moskowitz* on behalf of Archilla-Marcocci Spanish Radio Company; *Christopher D. Imlay* on behalf of Martha Hahn and Philip Y. Hahn; and *Julian P. Feret* on behalf of Vernon H. Baker d/b/a Rural Radio Service and Edward A. Baker d/b/a Bayshore Communications.

DECISION

Adopted: July 29, 1985; Released: August 2, 1985.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD CHAIRMAN MARINO:

1. The issue presented in this case is whether 47 U.S.C. §307(b), which mandates the distribution of radio stations "among the several States and communities so as to provide a fair, efficient, and equitable distribution . . . " is effectuated by a grant of a first local broadcast station to: three small, separate, and distinct rural communities located in separate states; or one substantially larger community situated within a large urbanized metropolitan area. The above-captioned applications for Purcellville, Virginia, Earlysville, Virginia, and Denton, Maryland could all be simultaneously granted but for their respective mutual exclusivity with the Annandale, Virginia proposal. After a trial-type comparative hearing, Administrative Law Judge (ALJ) Kuhlmann released an Initial Decision (I.D.) on January 30, 1985 (FCC 85D-8), granting the Annandale application and denying the other three applications. The three losing applicants (hereinafter HRB) filed a joint set of exceptions challenging, principally, the I.D.'s findings that Annandale is a community for purposes of Section 307(b) and the application of Section 307(b) to the facts of this case. We adopt the I.D.'s findings and conclusions except as modified below but for the reasons that follow we conclude that a grant of the Purcellville, Earlysville, and Denton applications would better serve the public interest, convenience, and necessity.

2. *Community Status of Annandale, Virginia.* Section 307(b) contemplates that station assignments will be made to communities composed of geographically identifiable population groupings. *See Mighty-Mac Broadcasting Co.*, FCC 85R-53, released June 26, 1985, para. 5 (Rev. Bd). *See also* Section 73.1120(a) of the Commission's Rules, 47 CFR §73.1120(a) (each AM, FM and TV broadcast station will be licensed to the principal community or political subdivision which it primarily serves). "This requirement is generally satisfied if the proposed community is either incorporated or listed in the U.S. Census. . ." *FM Channel*

Assignments (Vimville, Mississippi), 55 RR 2d 256, 258 (MM 1983). *But cf. Debra D. Carrigan*, 58 RR 2d 96, 104-108 (Rev. Bd. 1985) (Review Board expressing strong reservations that the mere listing of an unincorporated place in the Census is sufficient to automatically confer community status). Here, Annandale, a suburb of Washington, D.C. and recognized in the 1980 census with a population of 49,524 (*see* I.D., para. 8), is an unincorporated community located within the governmental unit of Fairfax County, Virginia, a unit governed by an elected Board of Supervisors and a County Executive selected by the Board of Supervisors (*id.*). Although conceding that Annandale is part of the Washington, D.C. metropolitan area and a regional population center, the I.D. concluded, based on seven paragraphs of demographic data (paras. 8-14), that:

> the record reflects that Annandale is recognized as a community within the very populous Fairfax County and has much of the same attributes as McLean, Virginia, also in Fairfax County, which the Commission held to be a Washington, D.C. suburban community despite its lack of government, specific boundaries, and reliable population data. *See Seven Locks Broadcasting Co.*, 37 FCC 82 (1964).

Id. at para. 32. Thus, the ALJ rejected HRB's allegation that Annandale is not a community for Section 307(b) purposes. *Id.*

3. HRB reiterates its objections as to Annandale's community status, asserting among other things that *Seven Locks, supra*, upon which the ALJ principally relies, fails to support the proposition stated by the ALJ. This latter contention is without merit. As noted by Archilla-Marcocci in its opposition brief (at 19-20), HRB questioned the ALJ's interpretation of *Seven Locks* by excerpting portions of the *Seven Locks* Initial Decision (37 FCC 92, 129), which was effectively reversed on Commission review. *Seven Locks Broadcasting Co., supra.* The Commission concluded that both station locations involved in the *Seven Locks* proceeding qualified as communities for purposes of Section 307(b) even though the "communities" did not have clearly delineated areas and populations. 37 FCC at 84.

4. Although the question of community status is easily answered if an alleged community is incorporated, *see FM Channel Assignments (North Naples, Florida)*, 41 RR 2d 1549, 1553 (Bureau 1977), when it is not, as here, the Commission looks to various indicia including "whether the residents function as and conceive of themselves as residents of a community, around which their interests coalesce." *Id.*, at 1551. *FM Channel Assignments* (Vimville, Mississippi), *supra*, 55 RR 2d at 258. *See also Mighty-Mac Broadcasting Co., supra*, at para. 5 (consideration of attributes or indicia of community such as political, commercial, social, and religious organizations and services serving the community). Although HRB assails the degree of certainty concerning Annandale's precise boundaries, population, and distinctive social services adduced by Archilla-Marcocci (Exceptions at 20-24), it is clear as conceded by Archilla-Marcocci (Opposition at 11-13) that the nebulous nature of the demograph-

ic data stems from the fact that Annandale is unincorporated and lacks officially recognized boundaries. The Commission, however, has cautioned against imposing a too stringent burden of proof upon suburban applicants because the "very nature of these . . . communities precludes an absolute showing that they have an identifiable population grouping separate and distinct from all others . . ." *Seven Locks Broadcasting Co., supra,* 37 FCC at 84. We conclude that the objective indicia set forth in paras. 8-14 of the I.D., coupled with the testimony of Paul Sutura, who chaired for two years the Annandale District Council (a coalition of leaders of eighty-six civic and homeowner associations in the Annandale Supervisory District), are more than sufficient to support the ALJ's finding that Annandale is a licensable community within the terms of Section 307(b). *See Mighty-Mac Broadcasting Co., supra; Sunshine Broadcasting, Inc.,* FCC 85R-52, released June 26, 1985. In light of our holding, we need not reach Archilla-Marcocci's contention that HRB is estopped from excepting to Annandale's community status because HRB never sought a community (Section 73.1120(a)) issue. *Compare Sunshine Broadcasting, Inc., supra* (matter explored without a formal community issue), *with Mighty-Mac Broadcasting Co., supra* (issue added so that community status could be explored).

5. In a variant to its argument discussed in paras. 3 and 4 above that Annandale is not a community, HRB charges that the Annandale proposal, by its choice of 2.5 kW rather than a lesser power adequate to serve Annandale, tips its hand that it intends to be yet another Washington, D.C. station. Exceptions at 27-28. Archilla-Marcocci, however, responds that its proposed use of 2.5 Kw is indicative of nothing more than an attempt to make an efficient use of the frequency, noting that there is little point in serving less than the optimal number of listeners permitted by the rules. (Opposition at 19). We are not persuaded by HRB's speculation. At the outset, contrary to an assertion in its exceptions (at 28), *Metro Broadcasting, Inc.,* 99 FCC 2d 688, 57 RR 2d 440 (Rev. Bd. 1984), is not applicable to the facts here. In that proceeding, which involved a contest between television applicants proposing Orlando, Florida or the contiguous community of Winter Park, the Review Board rejected a contention that it award a Section 307(b) preference to the Winter Park applicant, noting that *all* of the applicants would serve the *entire* Orlando metropolitan area. In doing so, the Board observed that "[t]elevision stations typically serve much larger areas than radio stations, involve considerably greater capital investments, and require larger audiences to attract more advertising revenues" and therefore "are generally considered as providing 'an areawide . . . service.'" *Metro Broadcasting, Inc., supra,* at para. 15. That case bears little resemblance to the facts of this proceeding. Rather, we agree with Archilla-Marcocci

(Opposition at 18) that HRB's argument is actually an attempt to "resurrect the defunct Suburban Community Policy," a policy designed to ascertain whether an applicant for a smaller community intended to serve a larger community nearby but specified the smaller community solely to secure a Section 307(b) preference. In its Report and Order eliminating the above policy, the Commission announced that it would presume that a licensee intends to serve the community designated if the licensee provides the requisite signal to the community of license, locates its main studio there, and proposes programming that will serve its needs. *Suburban Community Policy*, 93 FCC 2d 436, 456, 53 RR 2d 681, 696-697 (1983). Here, no one disputes that Archilla-Marcocci will comply with the above licensing requirements. Thus, there is no legal basis for finding that Archilla-Marcocci actually intends to serve Washington, D.C. rather than its specified community. *See generally Santee Cooper Broadcasting Co.*, 99 FCC 2d 781, 788-789, 57 RR 2d 662, 669-670 (Rev. Bd. 1984). We will treat Archilla-Marcocci's application as a *bona fide* proposal for the community of Annandale.

6. *Section 307(b) Analysis.* Whenever applicants specify different communities of license for their broadcast stations but propose operation on the same frequency, Section 307(b) requires that the Commission determine whether a "fair, efficient, and equitable distribution of radio service . . . among the several States and communities" substantially favors one community over the other before looking to the relative comparative qualities of the respective applicants, lest "the needs of the community . . . be subordinated to the ability of an applicant for another locality." *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 360-362 (1955); *WHW Enterprises* v. *FCC*, 753 F. 2d 1132, 1135 (D. C. Cir. February 5, 1985). In implementing the statutory language, the Commission traditionally seeks to determine the relative need of each applicant's proposed service area for a new reception service and the relative need of each applicant's specified community for a new transmission service (*i.e.* outlet for local expression). *See Kent-Ravenna Broadcasting Co.*, 44 FCC 2603, 2606, 22 RR 605, 611 (1961); *Alessandro Broadcasting Co.*, 99 FCC 2d 1, 6, 56 RR 2d 1568, 1571 (Rev. Bd. 1984). This inquiry in turn has typically focused on objectives set forth initially in *AM Station Assignment Standards*, 25 RR 1615, 1626 (1963):

> (a) to provide unimpaired service within the normally protected contours of new and existing standard broadcast facilities;
>
> (b) to provide a primary aural service to areas lacking that service;
>
> (c) to provide a first, local aural service to as many independent communities as possible; and
>
> (d) to provide multiple local aural services to as many independent communities as possible.

See Policy Statement on Section 307(b), 2 FCC 2d 190, 191, 6 RR 2d 1901, 1904 (1965). *See also Alessandro Broadcasting Co., supra*, 99 FCC 2d at 6, 55 RR 2d at 1572, where the Board held that recent simplifications of the FM priorities were applicable in a Section 307(b) determination for an AM channel; those revisions, however, are not decisional here.

7. Only the Earlysville proposal raised any reception considerations (I.D., paras. 28-29) — the other applicants' proposed service areas qualifying as well served (*i.e.*, reception of at least five services). The Earlysville applicant would provide a third service to 400 people, a fourth to 3,640, and a fifth to 2,505 people. (I.D., para. 28). The ALJ concluded, however, that the extent of underserved population was not substantial, entitling the Earlysville applicant to a very slight reception preference at most (*id.*, para. 29) and that whatever its weight it would not "overshadow the transmission factor in determining the outcome of this case." *Id.* In arriving at a determination under the transmission factor, however, the ALJ found that the Commission had changed its Section 307(b) policy concerning minority applicants by its Report and Order, *Clear Channel AM Broadcasting*, 78 FCC 2d 1345 (1980). *Id.*, paras. 38-39. There, so far as is pertinent, the Commission to foster more minority-owned stations modified the criteria for acceptance of an application for a new unlimited station or a nighttime facility by an authorized daytime station to include applicants in which over 50% of the ownership was held by minority persons. Section 73.37(e)(2)(iv), 47 CFR §73.37(e)(2)(iv). *Clear Channel AM Broadcasting, supra*, 78 FCC 2d at 1368-1369. In so doing, the Commission explained that the largest minority populations are found in the larger cities and that Section 73.37(e)(2) of the rules then in effect had restricted the filing of applications for new facilities in those locations. *Id.* Predicated on this Report and Order, the ALJ asserted that the Commission's previous Section 307(b) policy of favoring AM applicants for rural areas was not applicable where an urban application is presented by minority owners. I.D. para. 38. He added that with the removal of the policy favoring rural areas, there was no reason not to apply "the strong legal principle or presumption that the larger community without its own local broadcast service is entitled to a grant . . . ." *Id.*, para. 39. The ALJ concluded, therefore, that the Annandale proposal was to be preferred" because it [was] minority owned and [would] establish a first local outlet to a rapidly growing urban community with 49,524 persons." para. 40.

8. HRB challenges both the assertion that *Clear Channel AM Broadcasting, supra*, altered in any way the Section 307(b) priorities to be applied in this case, and the determination that the Section 307(b) preference for a new transmission service is based solely on population. Rather, HRB contends that it is entitled to a transmission preference for providing a first local aural service "to as many independent communities

as possible," quoting language articulated by the Commission on many occasions. *See e.g., FM Broadcast Rules*, 40 FCC 662, 664 (1962); *AM Station Assignment Standards, supra*, 25 RR at 1626; *AM Station Assignment Standards*, 2 RR 2d 1658, 1668 (1964); *Policy Statement on Section 307(b), supra*, 2 FCC 2d at 191, 6 RR 2d at 1904.

9. At the outset, we agree with HRB that the minority ownership aspect of Archilla-Marcocci's application is not relevant here and should not have been taken into consideration by the ALJ in arriving at his Section 307(b) determination. To its credit, Archilla-Marcocci acknowledges in its opposition (at 4-5) that the provision concerning minority applicants in *Clear Channel AM Broadcasting, supra*, was pertinent only to applications for new unlimited stations or new nighttime facilities by authorized daytime stations — neither of which condition is present here since Archilla-Marcocci is applying for a daytime only facility. Furthermore, although the ALJ is correct that the Commission attaches high importance to fostering the participation of under-represented minorities in the ownership and operation of broadcast stations, the absence of any language in the Report and Order explicitly altering the traditional Section 307(b) priorities is sufficient to persuade us that a major policy revision concerning Section 307(b) was not contemplated therein. (*See FCC* v. *Allentown Broadcasting Co., supra*, enjoining the Commission to determine which community has the greater need for additional services and then to determine which applicant can best serve that need). We shall now turn to the traditional factors under Section 307(b).

10. Historically, when evaluating the need for a local outlet, "the Commission presumes that the most populous community has the greatest need for the first service, provided that it has commensurately greater civic, cultural, religious, social and commercial attributes," *Ruarch Associates*, 99 FCC 2d 338, 341, 56 RR 2d 1593, 1594 (Rev. Bd. 1984). That presumption, however, presupposes a comparison of the radio needs of one community versus another community. This proceeding on the other hand appears to be a case of first impression where we have the additional factor of taking into account the number of transmission facilities that can be granted: three versus one. *See Horne Industries, Inc.*, 53 RR 2d 1647 (Rev. Bd. 1983) (enjoining the Review Board to apply present policies to new factual situations). HRB cites three cases decided in the late 1940's where the Commission, when faced with a choice of granting two stations versus one station, opted for the grant of the two stations. *Magnolia Broadcasting Co.*, 12 FCC 14, 3 RR 1322 (1947); *Leonard A. Versluis*, 12 FCC 342 (1947); *George A. Ralston and Jerry C. Miller et al.*, 12 FCC 784, 3 RR 1288 (1948). But, as correctly noted by both the I.D. (at para. 39 n. 14) and Archilla-Marcocci (Opposition at 8-11),

and unlike the facts in the instant case, the total population of the two communities receiving local outlets was greater than the community of license that would be primarily served by the losing applicant. Thus, the guidance provided by these cases, if any, is very slight.

11. The intent underlying Section 307(b) was to "enjoin 'an equitable distribution of stations over the entire country.'" *Pasadena Broadcasting Co.* v. *FCC*, 555 F. 2d 1046, 1050 (D.C. Cir. 1977). Such legislation was deemed necessary to forestall the larger urbanized areas from ultimately seizing all available radio frequencies at the expense of the sparsely populated areas to secure radio facilities to meet their demands. *Id.* The Court in *Pasadena Broadcasting Co., supra*, cautioned against automatically awarding a license to the applicant who would encompass the most listeners within the range of its signal lest all frequencies sooner or later would be licensed to powerful stations in major population centers. *Id.* at 1049-1050. Although this language was directed to the reception service aspect of Section 307(b), it would appear to be pertinent also to our inquiry here with respect to the transmission aspect. *See also DuPage County Broadcasting, Inc.*, 19 FCC 2d 250, 253, 17 RR 2d 229, 233 (Rev. Bd. 1969) ("a disparity in population between two communities is not, of itself, dispositive of the determination of which community has the greater need for a transmission service"). Furthermore, as noted by HRB (at 15), the Commission's Report and Order, *Clear Channel AM Broadcasting, supra*, which was designed to provide additional outlets for self expression to as many communities as practicable (*see* 78 FCC 2d at 1349), would not have been undertaken had the Commission merely desired to provide radio service to as many listeners as possible.

12. In the instant proceeding, on the one side, we have three small, distinct communities located in rural areas: Denton, Maryland, with a 1980 population of 1,927 (through annexation, its population was 2,304 in 1981), is the county seat of Caroline County, and serves as an important central area for county government, county courts and the county's health center (I.D., paras. 22-23); Purcellville, Virginia, located 48 miles away from Washington, D.C., with a population of 1,567, also has its own local government made up of a seven member town council and headed by a mayor (*Id.*, para. 16), and Loudoun, County, in which Purcellville is located, only has one AM radio station licensed to it (Hahn Exh. 3, p. 6); and Earlysville, Virginia, an unincorporated community with a population, depending on its definition, of as few as 280 and as many as 2800, has a number of businesses, churches, and civic organizations (paras. 20-21). In contrast, Annandale, with a much larger population and, concededly, many more community organizations, is located in the hub of an active and broadcast-filled metropolitan urbanized area. Keeping in mind that the original intent of Section 307(b) was to assist sparsely populated areas

in securing radio facilities to meet their demands, that the Commission has stated many times that one of its priorities was to provide a first local service to as many communities as possible, and that every community of "appreciable" size is presumed to need at least one radio station for local self-expression, *Plainview Radio*, 24 FCC 405, 421, 15 RR 2d 363, 381 (1958), we conclude that grant of the HRB applications would better implement Section 307(b) for the following reasons:

(a) the Earlysville proposal would provide a third daytime service to 400 people, a fourth service to 3,640 people, and a fifth service to 2,505 people. *See Caldwell Broadcasting Corp.*, 57 RR 2d 1039, 1043 (Rev. Bd. 1985); *Kaldor Communications, Inc.*, 56 RR 2d 137, 139-140 (Rev. Bd. 1984); *cf. Alessandro Broadcasting Co., supra*, 99 FCC 2d at 7, 56 RR 2d at 1572. (Although not dispositive, the Earlysville applicant is entitled to a reception service preference);

(b) the Purcellville, Earlysville, and Denton communities have a greater relative importance to the surrounding areas than does Annandale; *e.g.* Denton is the county seat whereas Annandale is one of many regional population centers within the Washington, D.C. metropolitan urbanized area. *See Radio Haddonfield, Inc.*, 37 FCC 168, 3 RR 2d 25 (Rev. Bd. 1964) (smaller community prevailed on transmission priority because of its greater importance to the surrounding areas);

(c) grant of the Purcellville, Earlysville, and Denton applications would result in the award of three new local outlets rather than only one; and

(d) grant of the three applications would permit us to provide a radio service to two separate states rather than one. "[T]he Commission shall make such distributions of licenses . . . among the several *States* and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." Section 307(b) of the Communications Act. (Emphasis added).

13. In sum, we recognize that this is a close Section 307(b) case because each of the communities is seeking its first broadcast station and thus is presumptively entitled to a first local outlet service and because there are equities favoring either Section 307(b) choice. On balance, however, we believe that the better result is to favor the grant of three independent facilities, rather than one, particularly where that facility would be located in the midst of a large well-served urbanized area.

14. ACCORDINGLY, IT IS ORDERED, That the applications of Martha Hahn and Philip Y. Hahn (File No. BP-830121AF), Rural Radio Service (File No. BP-830121AG), and Bayshore Communications (File No. BP-830121AI) for construction permits to establish new AM stations at Purcellville, Virginia, Earlysville, Virginia, and Denton, Maryland ARE GRANTED, and the application of Archilla-Marcocci Spanish Radio Company (File No. BP-830121AD) IS DENIED; and

15. IT IS FURTHER ORDERED, That the petitions for leave to amend filed May 1, 1985, by Rural Radio Service and Bayshore Communi-

cations, respectively, ARE GRANTED, and the amendments ARE ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

FCC 85D-8

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Archilla-Marcocci Spanish Radio Company Annandale, Virginia	MM Docket No. 84-49 File No. BP-830121AD
Martha Hahn and Philip Y. Hahn Purcellville, Virginia	MM Docket No. 84-50 File No. BP-830121AF
Vernon H. Baker d/b/a Rural Radio Service Earlysville, Virginia	MM Docket No. 84-51 File No. BP-830121AG
Edward A. Baker d/b/a Bayshore Communications Denton, Maryland	MM Docket No. 84-52 File No. BP-830121AI
For Construction Permit	

Appearances

Bruce Eisen and *Allan Moskowitz* on behalf of Archilla Marcocci Spanish Radio Company; *Christopher D. Imlay* on behalf of Martha Hahn and Philip Y. Hahn; and *Julian P. Freret* on behalf of Vernon H. Baker d/b/a Rural Radio Service and Edward A. Baker d/b/a Bayshore Communications.[1]

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: January 25, 1985; Released: January 30, 1985

[1] Christopher D. Imlay and Julian P. Freret are the only two partners in the law firm of Booth & Freret; together they represent three of the four remaining applicants in the proceeding. Messrs. Imlay and Freret maintain that since all three of their clients could prevail under a §307(b) analysis, there is no conflict among their clients' interests.

1. On January 23, 1984, the Chief, Mass Media Bureau designated for hearing seven applications to operate a standard radio broadcast station on 840 KHz. 29 Fed. Reg. 5663 (1984). The applicants proposed to locate the facility in five communities: Annandale, Burke, Purcellville, and Earlysville, Virginia and Denton, Maryland. Three of the applications were dismissed but only one of the communities, Burke, Virginia, was eliminated when that occurred.[2] The following issues designated by the Bureau remain for resolution:

1. To determine the areas and populations which would receive primary service from each proposal, and the availability of other primary aural services to such areas and populations.

2. To determine in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient, and equitable distribution of radio service.

3. To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications, if any, should be granted.[3]

2. A prehearing conference was held on April 9, 1984 and oral hearing sessions were held on August 28, 1984 and September 6, 1984. The record was closed on September 6, 1984. *Memorandum Opinion and Order,* FCC 84M-4034, released September 21, 1984. All parties filed proposed findings of fact and conclusions of law on October 29, 1984 and replies on November 13, 1984. Those filed by Martha Hahn and Philip Y. Hahn, Vernon Baker and Edward A. Baker were the same.

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[2] The applications of Annandale Pan American Broadcasting Corporation (MM Docket No. 84-46, File No. BP-820811Am, Annandale, Virginia) and EZ Communications (MM Docket 84-48, File No. BP-830121AB, Burke, Virginia) were dismissed with prejudice, *Order,* FCC 84M-1644, released April 4, 1984, and the application of Asian American Communications, Inc. (MM Docket No. 84-47, File No. BP-830121AA) was also dismissed with prejudice. *Memorandum Opinion and Order,* FCC 84M-1987, released April 26, 1984.

[3] Designated Issue 1, the environmental impact issue, was deleted at the request of the Mass Media Bureau. *Memorandum Opinion and Order,* FCC 84M-2942, released July 2, 1984. Issue 2, the hazard to air navigation issue was previously resolved with regard to Vernon H. Baker d/b/a Rural Radio Service (*Memorandum Opinion and Order,* FCC 84-2942, released July 2, 1984) and Archilla-Marcocci Spanish Radio Company. *Memorandum Opinion and Order,* FCC 84M-4034, released September 21, 1984. Edward A. Baker d/b/a Bayshore Communications filed, on March 6, 1984, FAA notification that his proposed site would not present a hazard to air navigation. That amendment also notifies the Commission about Mr. Baker's media interests. The amendment will be granted. Although Mr. Baker has not moved for summary decision and did not introduce evidence on the issue at the hearing. Acceptance of the amendment leaves no genuine issue of material fact and summary resolution of the issue is warranted. In addition, designated issue 5, the standard comparative issue, was not considered after only one applicant for each community remained. *Memorandum Opinion and Order,* FCC 84M-1987, released April 26, 1984 at ¶3.

Findings of Fact

A. Areas and populations which would receive primary service from each proposal, and the availability of other primary aural services to such areas and populations.

3. The applicants will serve the following populations and areas within the 0.5 mV/m daytime contours calculated for their proposals:

Applicant	*Population 1980 Census*		*Area (In Square Miles)*	
Archilla-Marcocci Spanish Radio Company	3,063,302		4,781	
Bayshore Communications	345,381		4,029	
Interference received	38,009	(11.0%)	448	(11.1%)
Interference free	307,372		3,581	
Hahn	107,170		1,127	
Interference received	43,120	(40.2%)	448	(39.8%)
Interference free	64,050		679	
Rural Radio	257,885		5,319	
Interference received	13,285	(5.2%)	371	(7.0%)
Interference free	244,600		4,948	

Archilla Exh. 2(b) at Figure 14 Hahn Exh. 5.[4]

4. All areas within the respective 0.5 mV/m contours of Archilla, Edward A. Baker and the Hahns receive 5 or more aural services. Archilla Exh. 2(b) at 3.

5. Vernon H Baker's proposal for Purcellville would, however, serve areas within its 0.5 mV/m contour which receive less than 5 other aural services. Archilla Exh. 2(b) at 3. Areas having less than 5 other aural services that are free of interference from his proposal are:

	Population 1980 Census	*Area (In Square Miles)*
Third Aural Service	400	12
Fourth Aural Service	3,640	32
Fifth Aural Service	2,565	84

Archilla Exh. 2(b) at Figure 14.

[4] Archilla-Marcocci's coverage used in these findings is that proposed from its present antenna site. That coverage is depicted in its exhibit 2(b). The other parties have argued that Archilla-Marcocci's coverage should be limited to one or the other of its previously designated antenna sites since its currently proposed antenna site enlarges the population and area covered. They have not shown, however, that for §307(b) purposes amended areas and populations should not be considered. Cf. *Santee Cooper Broadcasting Company of Hilton Head, Inc.*, FCC 84R-87, released December 7, 1984 (Coverage from an amended site used in comparing applicants to determine which would provide the best practicable service). In any event, the differences in coverage between Archilla-Marcocci's sites does not materially change the proportionate difference in its coverage from that of the other applicants and its proposed primary signal does not provide reception service that is material to the resolution of this case.

6. The total population which Edward A. Baker, Vernon H. Baker, and the Hahns would cover with their primary signals is 710,436. However, 94,414 persons within their proposed primary signal are in areas that will receive interference and 21,769 in commonly served areas. When these are considered, their net population in the interference free uncommon service area is 594,253. Archilla Exh. 2(b), Figure 14 at 2.

7. The total population within the net uncommon service area proposed by Archilla-Marcocci is 2,505,862. Archilla Exh. 2(b) at Figure 14 at 2.

B. The communities to be served.

I. Annandale Virginia

8. Archilla-Marcocci has applied for Annandale which has no local radio or television stations. Archilla Exh. 1 at 5. Annandale is not an incorporated community with its own government; it is part of Fairfax County which is governed by an elected Board of Supervisors and a County Executive selected by the Board of Supervisors. Archilla Exh. 1 at 2. However, Annandale is a census designated place and had, in 1980, a population of 49,524 persons, an increase of 80.6% from 1970. Archilla Exh. 1, App. 1 at 1-6. Paul Sutara, who served on the Annandale District Council for six years and was the Council's chair for two years,[5] described the boundaries of Annandale as to the south, Braddock Road; to the west, Guinea Road, Prosperity and Woodburn Roads; to the north, Gallows Road and Annandale Road; and to the east, Columbia Pike and Little River Turnpike. Archilla Exh. 1 at 4; Tr. 63. He received this information from the staff of the Annandale Supervisors' Office. Tr. 71, 72. Mr. Sutara believed the U.S. ZIP Code 22003 defined the boundaries of the Annandale community, based on information supplied by the Office of Audrey Moore, Annandale Supervisor to the Fairfax County Council. Archilla Exh. 1 at 3; Tr. 71 and 72. The Annandale Chamber of Commerce also recognizes these boundaries as defining Annandale. Archilla Exh. 1 at 3; Appendix 3-A. Mr. Sutara stated that people who live within these boundaries consider themselves to be residents of Annandale. Archilla Exh. 1 at 4.

9. The 1980 U.S. Census found that Annandale's median household income is $30,941 and its median age is 31.9 years. Its population by age is as follows: 0-17 years, 12,710; 18-44 years, 22,412; 45-64 years, 11,533; 65 years or older, 2,870. Archilla Exh. 1, App. 1 at 3, 6. Almost all adults, 90.8%, graduated from high school and nearly half, 45.4%, from college.

[5] The Annandale District Council is comprised of the leaders of 86 civic and homeowner associations in the Annandale Supervisory District, which includes the community of Annandale. The purpose of the Annandale District Council is to promote the civic, community and general welfare of local citizens.

Archilla Exh. 1, App. 1 at 2. The number of households increased between 1970 and 1980 to 18,021, or by 121.4%. Archilla Exh., App. 1 at 1,2,6.

10. 1980 U.S. Census statistics show that 2.7% of Annandale's population is black, and 3.8% is Hispanic. Archilla Exh. 1, App. 1 at 1 and 5. Most men (84.8%) and most women (62.5%) in Annandale who are over 16 years old are employed. Archilla Exh. 1, App. 1 at 3, 10. The U.S. Census shows that Annandale has 27,570 workers 16 or older and approximately (only 25,861 reported where they worked) 3,536 of the 25,861 employed work in the area of their residence. *Id.*

11. While educational and safety services are provided by Fairfax County, within Annandale there are a police station, two fire and rescue stations, Annandale High School, Jefferson High School, Poe Intermediate School, eight elementary schools, and a campus of Northern Virginia Community College. Archilla Exh. 1 at 5, 6; Tr. 77-78.

12. Health care facilities are also located in Annandale. Fairfax Hospital is within the community of Annandale. Tr. 76-77. Other health facilities within the community include the Annandale Center of the Fairfax-Falls Church Community Services Board (mental health services), the Woodburn Center, Fairfax House (a residential treatment center and school for teenage boys), Oakton Arbor (a group home program for troubled adolescent girls), and the Northern Virginia Mental Health Institute. Archilla Exh. 1 at 6.

13. Annandale is served by 35 churches, its own branch post office and the George Mason Regional Library. The Fairfax County Park Authority is headquartered in the community of Annandale and oversees 14,000 acres of park land throughout the county. Parks located within the community of Annandale itself, include Hidden Oaks Nature Center, Annandale Community Park, Wakefield Park & Recreation Center, Mason District Park and Green Springs Farm Park. Archilla Exh. 1 at 6.

14. Annandale has numerous local businesses, stores, and banks that serve the community and the residents of the area. Archilla Exh. 1 at 5, 7. It also has its own Chamber of Commerce. *Id.*

II. Purcellville, Virginia

15. Martha and Philip Y. Hahn have applied for Purcellville, Virginia, which is an incorporated town 48 miles from Washington, D.C. Hahn Exh. 3 at 1, 140. The town occupies two square miles and had a population of 1,567 in the 1980 U.S. Census. Hahn Exh. 3 at 1, 145. While Purcellville's population has decreased since 1970 from 1,775, it has increased over the 1960 population of 1,419. *Id.* There are 577 households and 432 families. Hahn Exh. 3 at 149. Although its population has been decreasing, there are new housing developments being planned and the Comprehensive Plan adopted by the Purcellville Town Council on June 20, 1981 found that

reasonable forecasts indicate that the population may double by the year 2000. Hahn Exh. 3 at 153. The Town Council's estimate, however, appears to be based on "human judgment." *Id.*

16. Purcellville has its own local government made up of a seven member town council, which is headed by a mayor. It also has a town manager, who is appointed by the council and acts as town administrator. Hahn Exh. 3 at 140, 142-43. The council has the power to tax land, borrow money, acquire land and rights of way, and provide other municipal services. Hahn Exh. 3 at 142. Purcellville has nine industries that employ 200 persons, 73 retail establishments, 53 businesses that provide services and an Economic Development Advisory Committee, established by the Council. Hahn Exh. 3 at 157, 158, 159, 160.

17. The town operates it own water system. There are a county public library and a county operated public elementary school and high school within the town. There are also private nursery and day care facilities.[6] In addition, there are volunteer fire and rescue facilities, four doctors, four dentists, and a four person police department. The town also has a community center, seven churches, but no newspaper, radio or television station. Hahn Exh. 3 at 3, 4, 208, 209, 210, 211; Tr. 140-41.

III. Earlysville, Virginia

18. Vernon H. baker d/b/a Rural Radio has proposed operating at Earlysville. Earlysville is an unincorporated community located in the northern part of Albemarle County, directly north of Charlottesville, Virginia. Rural Radio Exh. 2 at 1. Mr. Baker relied on the testimony of William Ray, who lived in Earlysville for thirteen years. Tr. 204-05.[7] Mr. Ray described Earlysville as an area within a seven mile radius of the Earlysville crossroads. He claimed that people within that area, if asked, would state that they live in the Earlysville community. Rural Radio Exh. 7; Tr. 205-07, 217, 228-29, 232, 235, 240. This view was based solely on Mr. Ray's view formed from living in the community. *Id.*

19. Mr. Ray believes that the population of Earlysville is essentially the same as the postal ZIP code 22936. Rural Radio Exh. 8; Tr. 219. He also believes that the population of Earlysville would be the number of postal boxes multiplied by 2.7 persons, which is the expected number of persons per box according to the U.S. Census. Tr. 249, 250. On this basis, he estimates Earlysville's population to be 3,507. Tr. 253. The record reflects, however, that Mr. Ray's premise about the ZIP code is not

[6] The school age population has shown a decline in Purcellville and the median age in 1980 was 37.5 years. Hahn Exh. 3 at 2, 90 209.

[7] The transcript in this proceeding has two sets of pages numbered 199-207. One set refers to testimony heard on August 28, 1984 and the other to testimony heard on September 6, 1984. Mr. Ray testified only on September 6 and his testimony is entirely contained in Volume II.

entirely reliable since the community of Free Union is within the 22936 ZIP code and it is not part of Earlysville according to Mr. Ray. Tr. 254-55. Nevertheless, Mr. Ray believed his postal box estimate to be the best population statistic he could present since he did not find official U.S. Census data for Earlysville. Tr. 246, 260. In an attempt to obtain more official data, he "called down and talked to one of the girls that answered the phone at the Albemarle Extension Service and [he] asked her if they had any figures. She said they did not" and referred him to the Post Office. Tr. 252.

20. In addition, following the hearing, Rural Radio submitted a calculation of the population within the minor civil divisions by its engineer, Peter V. Gureckis, of the area described as Earlysville, Virginia by Mr. Ray. Mr. Gureckis concluded that U.S. Census data indicated 2,232 people within that area. Letter from Julian P. Freret with attachment (September 14, 1984). Archilla-Marcocci submitted a letter it had received from Joan Davenport, Senior Planner for Albemarle County and Katharine Imhoff, Chief of Community Development in Albemarle County (September 20, 1984). Letter from Allan G. Moskowitz (September 24, 1984). Davenport and Imhoff indicate that Earlysville, located directly north of Charlottesville, Virginia, is a village with a population that is difficult to determine because it is unincorporated. *Id.* They point out that 1980 U.S. Census information on Block Group 2, Census Tract 102 most closely follows the boundaries of Earlysville as defined in the Albemarle County Comprehensive Plan. *Id.* Although they also point out that there are two other subdivisions, Briarwood and Camelot, included in Block Group 2 which are not part of Earlysville. They also note, however, that a broader definition of Earlysville might include Census Tract 102 in Block Group 1. Whichever method is used, the data appear to indicate that Earlysville may have as few as 280 people and perhaps under a broad definition as many as 2800. *Id.*[8]

21. All governmental services for Earlysville are provided by Albemarle County or by private vendors. Rural Radio Exh. 2 at 4. There is, however, a volunteer fire department in Earlysville. Rural Radio Exh. 2 at 4. And, in addition, the community has a number of businesses, churches, and civic organizations. Rural Radio Exh. 2 at 2,3; Tr. 236, 237,241-43. There are no radio or television stations licensed to Earlysville.

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[8] Mr. Baker objects to considering Archilla Marcocci's additional population data submitted following cross-examination of Mr. Ray because it is not new information that arose following his testimony. In making this argument, however, Mr. Baker ignores the specific invitation extended to all parties to provide more reliable information when Mr. Ray testified that no reliable official data existed. Mr. Baker's reasons for not attaching great weight to the filing have been considered; they too will be rejected. Both the September 14, 1984 filing of Vernon H. Baker and the September 24, 1984 filing of Archilla-Marcocci will be made a part of the record and considered to the extent relevant.

IV. Denton, Maryland

22. Edward A. Baker, d/b/a Bayshore Communications has applied for Denton, Maryland. Denton is the county seat of Caroline County and according to the 1980 U.S. Census its population was 1,927. Bayshore Exh. 2 at 1. Denton's population grew 23.4 percent between 1970 and 1980 and in 1981, through annexation, the population became 2,304. *Id.* Denton is governed by five elected commissioners and they select a mayor. The town is administered by a town manager. Bayshore Exh. 2 at 6. Municipal services such as water, sewage, trash collection and a recreation program are provided by the town. Bayshore Exh. 2 at 2. There are also a volunteer fire department and police department. Bayshore Exh. 2 at 3-4. Caroline County provides schools; one elementary school is located within Denton. Tr. 194-95.

23. Because Denton is a county seat, it is also the center of the county government, county courts, and the county health center. Bayshore Exh. 2 at 2-3, 4. There are also a nursing home and the Weslyan Health Care Center with 120 beds. Bayshore Exh. 2 at 4, 102. Denton has a park, churches, civic organizations, banks and more than 50 businesses. Bayshore Exh. 2 at 4, 5, 62. There is also an industrial park which covers 92 acres. Bayshore Exh. 2 at 2; Tr. 189.

24. Denton has two weekly newspapers, the *Times Record* and the *Caroline County Record,* but no radio or television station. Bayshore Exh. 2 at 6, 7.

Conclusions

25. The only determination to be made in this case is which proposal would provide a fair, efficient, and equitable distribution of radio service. Since 1927 the Commission has had three basic goals in assigning radio broadcast stations: to provide at least one service to everyone; service to as many persons from as many diversified sources as possible; and outlets for local self expression addressed to each communities' needs and interests. *Clear Channel Am Broadcasting,* 78 F.C.C. 2d 1345, 1349 (1980). The first two of the three goals are often referred to as reception goals and the last as a transmission goal. In this proceeding an allocation could be made to Annandale, Virginia or, if none is made there, allocations could be made to three communities, Purcellville and Earlysville, Virginia and Denton, Maryland.

26. The applications for these four communities would provide the first service outlet for local self expression; none of them currently has its own broadcast station. It is the local outlet goal on which this case turns. The proposed primary service areas of the applicants will not provide a first service and, except in the case of Vernon H. Baker's proposal for

Earlysville, Virginia, primary service will not be extended to underserved areas by any of the applicants.

27. The reception service proposals are as follows: Because the Annandale proposal would provide primary service to an urban area, its population coverage is over four times greater than the combined population of the three proposals for Purcellville and Earlysville, Virginia and Denton, Maryland. Archilla-Marcocci's proposal for Annandale would provide 0.5 mV/m daytime coverage in the net uncommon area to 2,505,862, while the Hahns and Bakers' proposals for Purcellville, Earlysville, and Denton would, in their uncommon service areas, extend primary daytime service to 594,253 persons. Nevertheless, the 0.5 mV/m service areas for all the proposals, except Vernon H. Baker's for Earlysville, already receive more than 5 services. When abundant service is available, no preference under the reception factor is assigned. *Resort Broadcasting Company, Inc.*, 41 F.C.C. 2d 640, 643 (Review Bd. 1973).[9] Archilla-Marcocci's proposed service area is 4,781 square miles, while the Hahns would cover 679 square miles, Vernon Baker, 4,948 square miles and Edward Baker, 3,581 square miles.

28. Only Vernon H. Baker's application for Earlysville, Virginia raises any reception considerations. Mr. Baker's proposal would provide daytime service to a small number of people who are underserved. He would provide a third service to 400 people (who are in .0016 of his proposed service area); a fourth service to 3,640 people (who are in .015 of his proposed service area); and a fifth service to 2,505 people (who are in .01 of his service area).

29. Mr. Baker argues that this service to underserved persons warrants a substantial preference. In *Resort Broadcasting, Inc., supra,* 41 F.C.C. at 643 the Review Board held that for §307(b) reception analysis a population that already has four services cannot be considered to be underserved. Most recently, when comparing applicants to determine which one would provide the best practicable service, the Review Board held that the largest or substantial preference would be assigned only to those proposals extending a first and second service, and then only if a large number of people would receive that service. *Christian Broadcasting of the Midlands, Inc.,* 57 Radio Reg. (P&F) 2d 87, 91 (1984). (In *Christian Broadcasting* a first service to 180 and a second service to

[9] Archilla-Marcocci claims reception credit for its superior population coverage by relying on a number of cases where the Review Board has given very slight credit for better population coverage in comparing the applicants under the best practicable service criterion. Archilla-Marcocci points to no instance in which credit has been given under a §307(b) determination. This dichotomy is exhibited by the Board's analysis in *Resort Broadcasting* (41 F.C.C. 2d at 647) where credit for larger coverage was denied under the §307(b) reception factor, but credited under the best practicable service comparative criterion.

3,774 was entitled only to a moderate preference.) Further, the Review Board stated that a slight preference is warranted if a third and fourth service is being provided to a substantial population. *Id.* A slight preference was assigned by the Board in *Christian Broadcasting* to an applicant that would provide a third and fourth service to 45,468 people. *Id.*[10] Pursuant to *Christian Broadcasting,* when Baker's proposed third, fourth, and even his fifth service, is considered, the number of persons who will receive service is not substantial and at the most a very slight reception credit is warranted. If the Board's §307(b) analysis in *Resort Broadcasting* is adhered to, and the fifth service is excluded, the importance of Baker's reception proposal becomes very, very slight. Whatever, the weight assigned, very slight or very, very slight, it does not overshadow the transmission factor in determining the outcome of this case.

30. The transmission service proposals are as follows: Archilla-Marcocci Spanish Radio Company is a partnership with two partners. Efrain Archilla-Diez owns 75% of the partnership and Carmen Junco Pagan owns 25% of the partnership and they are both Hispanic. Archilla-Marcocci Amendment to Form 301 filed July 19, 183.[11] Archilla-Marcocci's application is for Annandale, Virginia, a suburb of Washington, D.C. with a population of 49,524, of whom 3.8% are of Spanish origin, according to the 1980 U.S. Census.

31. Annandale, Virginia is not a chartered or incorporated city with its own government. It is instead a community within the governmental unit of Fairfax County. It does, however, as would be expected of a community with nearly 50,000 persons, have numerous community institutions and retail outlets. Located within the community are educational facilities which include all educational levels through college, safety facilities, numerous churches, medical and social welfare institutions. In addition, regional and county facilities that provide service to all of Fairfax County, such as the George Mason Library and the Fairfax County Park Authority are located within Annandale. There are numerous parks,

[10] Again when comparing the applicants, the Board granted a very slight preference to an applicant that would provide a fourth service to 576 people and a fifth service to 1,683. *WFSP, Inc.,* 56 Radio Reg. (P&F) 2d 1449 (Review Bd. 1984). In examining reception service under §307(b) the Board has most recently suggested that a fifth service may also be of some import. *See Kaldor Communications, Inc.,* 56 Radio Reg. (P&F) 2d 137, 140 (Review Bd. 1984).

[11] The 1980 U.S. Census found that Washington, D.C., Montgomery and Prince George's Counties in Maryland, Arlington, Fairfax, and Prince William Counties in Virginia, and the cities of Alexandria, Fairfax, and Falls Church in Virginia had a population of 91,216 people of "Spanish" origin; this represents an increase from 1.6% to 3.4% since 1970. *United Broadcasting Company,* 94 F.C.C. 2d 960, 983-85 (Admin. L.J. 1982); 94 F.C.C. 2d 938, 951 (Rev. Bd. 1983).

stores and banks located in Annandale. And, as is typical of most communities with business establishments, there is a Chamber of Commerce. There is little question, however, that Annandale is part of a metropolitan or regional population center since most people who live in Annandale work outside the community. Of the four communities being considered Annandale has shown the greatest population growth, 80.6%, in the last 10 year U.S. Census period.

32. The other applicants have argued that because Annandale has no government of its own, it is not a community for §307(b) purposes. But the record reflects that Annandale is recognized as a community within the very populous Fairfax County and has much the same attributes as McLean, Virginia, also in Fairfax County, which the Commission held to be a Washington, D.C. suburban community despite its lack of government, specific boundaries, and reliable population data. *See Seven Locks Broadcasting Co.*, 37 F.C.C. 82 (1964). Moreover, the other applicants at no time sought the special issue which is necessary for consideration of a claim that a designated area is not a community.

33. Martha and Philip Y. Hahn have applied for Purcellville, Virginia which in 1980 had a population of 1,567. Vernon H. baker, d/b/a Rural Radio Service, has applied for Earlysville, Virginia which has an estimated population of 280 to 2,800. And Vernon Baker's son, Edward A. Baker, d/b/a Bayshore Communications has applied for Denton, Maryland which had a 1980 population of 1,927.

34. Purcellville, Virginia has its own government, businesses and community institutions. Unlike Annandale, Purcellville's population decreased about 20% between 1970 and 1980, although there are some unscientific forecasts which indicate the population could increase and perhaps double in the next fifteen years.

35. Denton, Maryland's population grew between 1970 and 1980 by 23 percent and like Purcellville, it has its own local government. In addition, because it is the county seat of Caroline County, the county's courts and offices are located there. It has local businesses, health care facilities, parks, churches, and two weekly newspapers. Denton's facilities reflect the fact that it is the county seat.

36. Evidence about the population of Earlysville, Virginia, which is directly north of the larger community of Charlottesville, Virginia, is unofficial and contradictory. Nevertheless, if the rural areas surrounding the Earlysville crossroads are included, the population may be as much as 2,800. It has no local government, but there are churches and businesses within the area that identify with Earlysville. No information about Earlysville's growth was introduced.

37. Annandale, a suburban community within a large urban area, is eight times the size of the other communities combined. From 1970 to

1980 it exhibited three times the growth rate of Denton, Maryland, which was the only community proposed among the three other applicants that was able to establish any growth in that period. While population alone is not the decisive §307(b) factor, the institutions and economy of Annandale reflect the fact that it has a large population. In this regard it is also apparent that Denton, Maryland and Purcellville, Virginia are places having community institutions and businesses that are important to their small populations and areas. In contrast, Earlysville, Virginia exhibits only the most limited elements of community life. To one degree or another, however, each applicant has demonstrated that a local outlet for self-expression is warranted to serve local needs and interests.

38. While the Commission's previous §307(b) policy favored standard broadcast applicants for rural areas, that is no longer the case when the urban application is presented by minority owners. The Commission lifted its restrictions on applications for AM facilities in major urban areas if more than 50% of the ownership interest is held by minority persons (Blacks, Hispanics, American Indians or Alaskan Natives, and Asians or Pacific (Islanders). *Clear Channel AM Broadcasting,* 78 F.C.C. 2d 1345, 1368-69.[12] The Commission changed its policy in order to foster "participation of heavily under-represented minorities in the ownership and the operation of broadcast stations." *Id.* Furthermore, it is a factor, the Commission believes to be of "high importance." *Id.*

39. Previously, without regard to minority interests, the Commission had restricted urban applications "to stem a flood of applications for AM facilities in major cities already served by numerous stations." *Id.* at 1368.[13] That restraint having been lifted, there is no reason not to apply "the strong legal principle or presumption that the larger community without its own local broadcast service is entitled to a grant," even though, in this case, three small communities will be denied a first local outlet. *Affinity Communications, Inc.,* 96 F.C.C. 2d 685, 686 (Rev. Bd. 1984). In those few cases where the Commission has been faced with the choice of assigning a standard broadcast station to several communities or one community, it has chosen to provide service to two communities

[12] These applications are a direct result of the Commission's reappraisal of radio needs in its *Report and Order, Clear Channel AM Broadcasting,* 78 F.C.C. 2d 1345 (1980). In that order the Commission limited the service areas of Class I-A clear channel stations to make room for added unlimited-time radio stations. Id. at 1347. "Clear channel stations had long provided one method of achieving the Commission's primary goal of insuring at least one §307(b) broadcast service to as many people as possible. However, that use of spectrum space also hindered the ability to provide outlets for self expression or transmission facilities to as many communities as practicable." *Id.* at 1349.

[13] The Commission also assigned importance to such other factors as a first local nighttime aural broadcast outlet in communities to which no FM channel is assigned and adding to the spectrum space available for noncommercial broadcast stations. *Id.* at 1370.

instead of just one.[14] But in each of those cases local outlets were being provided to more people by doing so; that would not happen here if three rural outlets were selected over Annandale. Moreover, to not place primary emphasis on the number of persons to be served by a local outlet, would favor geographic location over population, which is exactly what the Commission said it would no longer do if presented with a minority applicant for an urban area.

40. It must, therefore, be concluded that Archilla-Marcocci Spanish Radio Company's proposal for Annandale, Virginia is to be preferred as a reception outlet because it is minority owned and will establish a first local outlet to a rapidly growing urban community with 49,524 persons. While the competing applicants would provide a local outlet for three communities, their combined population is, at best, slightly greater than 6,000 people, and none of the communities has the explosive growth of Annandale.

ACCORDINGLY, IT IS ORDERED that the petition for leave to amend, filed March 6, 1984 by Edward A. Baker d/b/a Bayshore Communications IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the applications of Martha Hahn and Philip Y. Hahn (MM Docket No. 84-50, File No. BP-830121AF). Vernon H. Baker d/b/a Rural Radio Service (MM Docket No. 84-51, File No. BP-830121AG), and Edward A. Baker d/b/a/ Bayshore Communications (MM Docket No. 84-52, File No. 830121AI) ARE DENIED and the standard broadcast application of Archilla-Marcocci Spanish Radio Company for Annandale, Virginia to operate on 840 kHz, 2.5 kW, D IS GRANTED.[15]

FEDERAL COMMUNICATIONS COMMISSION

EDWARD J. KUHLMANN, *Administrative Law Judge*

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[14] In *George A. Ralston and Jerry C. Miller et al.*, 12 F.C.C. 784 (1984), the Commission granted applications for the Chicago suburb of Oak Park (66,015) and Beloit, Wisconsin (25,365) and denied the application for Elgin, Illinois (38,333). The Commission pointed out that its first objective in providing a local outlet was to assure a local transmission facility for local self-expression, a need which is directly related to the size of the community's population. The second objective was to furnish service within as many communities as possible. By favoring Oak Park and Beloit, the Commission achieved both objectives. Two other cases decided about the same time achieved the same goal by licensing two communities instead of one. *See Magnolia Broadcasting Co.*, 12 F.C.C. 14 (1947); *Leonard A. Verslius (WLAV)*, 12 F.C.C. 342 (1947).

[15] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

License, Assignment of, AM
License, Assignment of, FM
License, Assignment of, Involuntary
License, Assignment of, Procedures

Requirement that officer of licensee sign assignment applications waived when proposed assignee has purchased stations' assets at public auction and licensee has failed to comply with court order directing licensee's officers to sign assignment applications. —*Arecibo Radio Corp.*

FCC 85-462

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re: Applications of Arecibo Radio Corporation (Assignor) Hato Abajo Development Corp. (Assignee) For Consent to the Involuntary Assignment of Licenses for Stations WNIK(AM) and WNIK-FM, Arecibo, Puerto Rico	File Nos. BAL-840403HS BALH-840403HT

MEMORANDUM OPINION AND ORDER

Adopted: August 9, 1985; Released: August 13, 1985

BY THE COMMISSION:

1. The Commission has before it (i) the captioned applications for Commission consent to the involuntary assignment of the licenses for WNIK(AM) and WNIK-FM, Arecibo, Puerto Rico, from Arecibo Radio Corporation ("Arecibo") to Hato Abajo Development Corp. ("Hato"); (ii) Arecibo's petition to return those applications; (iii) an informal objection to those applications filed by an individual named Gustavo Albizu ("Albizu"); and (iv) various related pleadings. Arecibo and Albizu contend that the

applications are defective because they were filed with neither the consent nor the signature of the licensee. Hato disputes Arecibo's and Albizu's contention.[1]

2. The assignor's portions of the subject applications are signed by the Marshall of the Superior Court of Puerto Rico, Arecibo Division, rather than by an officer of Arecibo. The chain of events leading to the Marshall's signing the applications began on April 29, 1980, when the Commission granted applications (BTC-800124FZ and BTCH-800124GA) for consent to the voluntary transfer of control of Arecibo from Manuel Cabrera, Jose Cabrera, and Hector Reichard, Jr. to the A.E.C. Holding Company ("A.E.C."), a company owned by Pablo Llerandi Alum and Carmen Phipps de Llerandi (collectively "the Llerandis"). The transfers were consummated on June 10, 1980. As consideration for the transfers, A.E.C. agreed to make a series of payments to the sellers. After a dispute arose regarding A.E.C.'s compliance with its payment obligations, Arecibo's former owners sued Arecibo, A.E.C., and the Llerandis in the Superior Court of Puerto Rico;[2] and an October 21, 1983, the court entered a default judgement in the plaintiff's favor. Arecibo's subsequent motion to set aside the judgement was denied on May 9, 1984. A second civil action,[3] an eviction proceeding brought in the Superior Court by Arecibo's landlord for nonpayment of rent, also resulted in the entry of a default judgement against Arecibo. On May 19, 1984, the court denied Arecibo's motion to set aside that default judgement.

3. WNIK(AM) and WNIK-FM are presently dark. While there appears to be some disagreement between Hato and Arecibo as to why the stations remain dark, Arecibo presently has no access to the stations' studios and transmitter site. In addition, the October 21, 1983, decree in the contract case awarded the Cabrera group approximately $450,000 in damages and directed that Arecibo's assets be sold at a public auction. After the Cabrera group purchased those assets at the auction, the court found "[t]hat the value of [WNIK(AM) and WNIK-FM]" without the licenses to

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[1] Because Arecibo has disavowed any claim to have its petition treated as a petition to deny, Arecibo Reply at 2-3, we will treat its pleadings as an informal objection pursuant to Section 73.3587 of the Commission's Rules, 47 C.F.R. § 73.3587. In view of this treatment, we need not reach Hato's arguments regarding the timeliness of Arecibo's initial pleading, the sufficiency of that pleading as a petition to deny, and Arecibo's alleged lack of standing to file a petition to deny.

[2] *Figueroa v. Alum*, Civil No. 82-3080A (filed June 23, 1982). Manuel Cabrera died on November 2, 1982; and the members of his estate, Elina Figueroa, Enid Cabrera, Maelmar Cabrera, and Mayra Cabrera, were substituted as plaintiffs in the civil action. These substitute plaintiffs, Jose Cabrera, and Hector Reichard, Jr., collectively, own 100% of Hato. This Opinion will refer to those stockowners as "the Cabrera group."

[3] *Jose Antonio Cabrera Quijano v. Arecibo Radio Corp.*, Civil No. 83-3033A.

operate them "is incomplete."[4] Therefore, the court in the exercise of its equity power directed the Llerandis

> to appear at the office of [the] Court's Marshall, at 10:00 a.m. of [sic] the 29th day of March, 1984, so that they will subscribe the documents necessary so that the Honorable Federal Communications Commission [may] consider a petition to transfer the licenses of the radio stations WNIK(AM) and WNIK (FM) to plaintiffs in order to make the judgement of this court and the remedy issued, effective.[5]

While the court recognized that broadcast station licensing is "the exclusive province of the Commission,"[6] the March 19 Order declared that if the Llerandis failed to appear at the Marshall's office at the designated time, the Marshall would subscribe the documents "with the same effect as if [the Llerandis] had done it by themselves."[7]

4. To support its request for the dismissal of the WNIK(AM) and WNIK-FM assignment applications, Arecibo argues that only its shareholders, acting through a duly authorized corporate officer, are competent to execute binding assignment applications. Arecibo points out, in effect, that the power to execute binding assignment applications is one aspect of control of a licensee and that the Commission has never authorized the transfer of control over or the assignment of the licenses for WNIK(AM) and WNIK-FM to the Marshall. Therefore, Arecibo reasons, the Marshall's signatures on the assignment applications are nullities. In addition, Arecibo claims that *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945), and *Kirk Merkley, Receiver*, 94 FCC 2d 829 (1983) [hereinafter cited as *Merkley I*], *recons. denied*, 56 RR 2d 413 (1984) [hereinafter cited as *Merkley II*], *appeal filed*, No. 84-1344 (D.C. Cir., July 25, 1984), establish that the Commission has exclusive authority over licensing matters and require the dismissal of the subject assignment applications. Arecibo reads *Merkley II* as holding that a license may pass from an incumbent licensee to another permanent licensee without the incumbent licensee's consent only when the incumbent licensee is legally disabled from holding a broadcast license. Arecibo contends that it has no legal disability and that the WNIK(AM) and WNIK-FM assignment applications are, therefore, procedurally defective.

5. For the most part, Alibizu's arguments echo those made by Arecibo. However, Alibizu also points out that the Superior Court lacks jurisdiction to make the public interest determinations the Commission makes in assignment proceedings and asks that the Commission authorize Arecibo to remain dark until it is able to resume broadcast operations. In the event

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[4] Order in *Figueroa v. Alum, supra* at 1 (Superior Ct. P.R., Mar. 19, 1984) [hereinafter cited as March 19 Order].

[5] *Id.* at 1-2.

[6] *Id.* at 1.

[7] *Id.* at 2.

Arecibo cannot resume broadcast operations, Alibizu requests that the WNIK(AM) and WNIK-FM channels be made available to new applicants.

6. Hato maintains that the Marshall's signatures are not nullities because the Marshall signed those applications in a representative capacity after being authorized to do so by a court of competent jurisdiction. Hato characterizes the court order directing the Marshall to sign the applications as a purely ministerial act to prevent the Llerandis from frustrating a remedy found necessary under the circumstances. Hato states that in *Peace Broadcasting Corp.*, 36 FCC 2d 675, 676 (1982), the Commission indicated that an application which had been rejected for want of the proposed transferor's signature could be "refile[d] . . . at such time [a state] court enters an order directing [the proposed transferor] to cooperate in the application. . . ." According to Hato, the court order in this case is the type of order contemplated in *Peace*; and, therefore, Hato contends, the subject assignment application should be accepted for filing.

7. This case requires the reconciliation of the Commission's jurisdiction over licensing matters with a local court's jurisdiction over contractual disputes. In attempting to resolve this matter, we are guided by the Supreme Court's decision in *Radio Station WOW v. Johnson, supra.* In that case, the Court ruled that the Supreme Court of Nebraska had exceeded its jurisdiction in ordering a licensee which had obtained its license through fraud "to do all things necessary" to secure the assignment of the license back to the predecessor licensee. *Id.* at 130. However, the Court also observed that "if the State's . . . [laws] can be effectively respected while at the same time reasonable opportunity is afforded for the protection of that public interest which [leads] to the granting of a license, the principal of fair accommodation between State and federal authority . . . should be observed." *Id.* at 132.

8. The Commission's attempts to reach a fair accommodation between its exclusive authority over licensing matters and the authority of state and local courts have resulted in procedures which acknowledge that breach of contract questions are matters for the courts to decide under state and local law. *See Merkley I, supra* at 838; *Hoyt C. Murphy*, 5 F.C.C. 2d 882, 884 (1966). Because the Commission does not possess the resources, expertise, or jurisdiction to adjudicate such questions fully, we normally defer to judicial determinations regarding the interpretation and enforcement of contracts for the sale of broadcast stations. *See Merkley I, supra* at 838. By this approach, we have preserved the Commission's exclusive authority to make public interest determinations on licensing matters while recognizing the role of state and local courts in adjudicating private contractual disputes. *See id.* at 837-38.

9. The application of the above principles to this case makes it clear that the Marshall's signatures are sufficient to make the WNIK(AM) and

WNIK-FM assignment applications acceptable for filing. The Superior Court clearly had jurisdiction to adjudicate the contractual dispute between the Cabrera group and the Llerandis. In the exercise of that jurisdiction, the court determined that Arecibo's assets should be sold at a public auction and that the Commission should have an opportunity to consider whether Arecibo's licenses should be assigned to the purchaser of those assets, Hato. The mechanism the court chose to give the Commission that opportunity—ordering the Llerandis to sign the assignment applications—was a permissible one which, absent the Llerandis' defiance of the court order, would have resulted in the filing of applications meeting all Commission requirements. *See Penrose Industries Corp.*, 15 RR 2d 1075 (1969); *cf. Radio Station WOW v. Johnson, supra* at 132; *Ninety-two Point Seven Broadcasting, Inc.*, 55 RR 2d 607, 610-11 (1984) (civil court can require litigants to submit settlement agreement to Commission). The Llerandis, however, refused to sign the applications; and the Marshall signed them at the direction of the court.

10. We do not read the Supreme Court's decision in *Radio Station WOW v. Johnson, supra,* to say that a civil court could never take the kind of action the Superior Court took in the case in order to bring a matter before the Commission. We understand the Supreme Court to have held that, in taking steps to place a matter before the Commission, a court can neither prohibit interested parties from making arguments to the Commission concerning the merits of the matter nor infringe in any way the Commission's exclusive, jurisdiction over licensing matters. *See Radio Station WOW v. Johnson, supra* at 130-31. The Superior Court's actions here have not interfered with Arecibo's right to assert before the Commission any argument regarding the assignment applications, and the court specifically left to the Commission the determination of all public interest issues which might be raised by the applications.[8] In these circumstances, it is clear that the court did not infringe federal licensing responsibilities in any way.[9] Accordingly, we will waive Section 73.3513 of the Rules[10] to the extent it requires that a duly authorized corporate officer sign assignment applications, and we will affirm the prior acceptance of the subject assignment applications for filing. *See Mid-Ohio*

[8] *See* March 19 Order, *supra* at 1-2.

[9] The Court's actions are also consistent with Section 310(d) of the Communications Act, as amended, 47 U.S.C. § 310(d). That section does not give Commission licensees the right to keep courts from placing before the Commission questions which the courts, in the exercise of their jurisdictions, have determined that the Commission should decide. *See Ninety-two Point Seven Broadcasting, Inc., supra* at 610-11. In addition, the act of placing before the Commission the question whether certain licenses should be assigned does not effectuate a transfer, assignment, or disposal of those licenses or of any right under those licenses. *Id.* at 611.

[10] 47 C.F.R. § 73.3513.

Communications, Inc., 90 FCC 2d 114 (1982); *Continental Telephone Corp.*, 41 FCC 2d 957, 959 (1973).[11]

11. The question remains whether we should grant those applications. Our responsibility to reach a fair accommodation between federal and nonfederal interests compels us to take into account those aspects of the Superior Court's decrees which do not usurp the Commission's exclusive authority over licensing matters. *See generally Radio Station WOW v. Johnson, supra* at 132. In the exercise of its jurisdiction, the court determined that the Llerandis had breached their contract with the Cabrera group and that the Cabrera group could be made whole only by the assignment of WNIK(AM)'s and WNIK-FM's licenses to Hato. *See* March 19 Order, *supra* at 1. The Commission has "recognize[d] that [a station's] operating authorization must usually accompany [its] physical assets." *Merkley I, supra* at 837. There is no reason to depart from that principle in this case.[12] Hato has possession of WNIK(AM)'s and WNIK-

[11] *Radio KDAN, Inc.*, 11 FCC 2d 934, *recons. denied*, 13 RR 2d 100, *aff'd on other grounds sub nom., Hansen v. FCC*, 413 F. 2d 374 (D.C. Cir. 1969), does not mandate a different result. In that case, the former licensee and putative assignee had signed the assignor's portion of the application pursuant to a mortgage provision which had automatically and irrevocably appointed him the licensee's attorney in fact for purpose of seeking reassignment of the license when the licensee defaulted on the mortgage. The Commission deemed that mortgage provision void ab initio because it was more than a device to keep the licensee from " 'caus[ing] the assignment application to be defective by refusing to sign the assignor's portion.' " 13 RR 2d at 102, *quoting* Hansen Application for Reconsideration. Indeed, the Commission indicated that the mortgage provision in question would have kept the licensee from asserting arguments before the Commission. *Id.* at 103. This case involves no reversionary provision or limitation on a party's ability to assert arguments before the Commission; and the Superior Court's order directing the Marshall to sign the assignment applications cannot, in any way, be viewed as automatically and irrevocably appointing Hato as Arecibo's attorney in fact for purposes of the WNIK(AM) and WNIK-FM assignment applications.

[12] In *Merkley*, the Commission had before it competing claims to a license from the incumbent licensee and the court-appointed representative of a creditor of a former licensee. The incumbent licensee was operating with equipment and property which had been acquired in a transaction separate from the one which led to the court proceeding. By court order, the equipment and property being used by the station could not be attached by the court-appointed representative. In those unusual circumstances the Commission determined that it was inappropriate to apply the general policy of having the operating authorization accompany the physical assets, because the incumbent licensee could continue to provide service to the public with its own equipment and property. *See Merkley I, supra* at 837. *See also Merkley II, supra* at 414, 416-17. In this case, it is appropriate to apply that policy in order to provide for the resumption of service to the public. To the extent *Merkley II* suggests that the licensee must be adjudged legally disabled before the Commission will assign a license involuntarily, *see* 56 RR 2d at 417, it does not accurately characterize our policy in this area. Our policy is to accommodate state and local court decrees adjudicating disputes over contract and property rights, unless a public interest determination under the Communications Act, such as the determination in *Merkely*, compels a different result.

FM's physical assets as a consequence of the Superior Court's exercise of its jurisdiction. Accordingly, Hato is in a position to resume operations and provide service to the public if the licenses are assigned to it. After review of the assignment applications, we have found Hato fully qualified to become a Commission licensee and that the grant of the assignment applications would serve the public interest, convenience, and necessity. Therefore, we will grant those applications. Our grants will be subject to and without prejudice to whatever action, if any, the Commission may deem appropriate in the event the order of the Superior Court of Puerto is reversed or otherwise modified on rehearing or appeal.[13]

12. Accordingly, IT IS ORDERED, that the applications for Commission consent to the assignment for WNIK(AM) and WNIK-FM from Arecibo Radio Corporation to Hato Abajo Development Corporation ARE HEREBY GRANTED; and that the petition to return those applications filed May 14, 1984 by Arecibo Radio Corporation and the informal objection to those applications filed June 15, 1984 by Gustavo Albizu, ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

[13] While Arecibo has indicated that it will appeal the Superior Court's order, there has been no judicial stay of that court's mandate. Absent such a stay, we decline to defer action on the assignment applications. We note that under Puerto Rican law, there appears to be no limitation of the time within which Arecibo must appeal the court order.

Character Qualifications
Comparative Hearing
Transmission First Local

Review Board dismissed joint request for approval of settlement agreement which was contingent on reversal of ALJ's disqualification of dismissing applicant. ALJ's Sec. 307(b) findings and conclusions adopted summarily and new FM grant affirmed. Grantee's comparative superiority was not excepted to.
—B&D Wireless Radio, Inc.
MM Docket No. 84-385

FCC 85R-64

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
B&D Wireless Radio, Inc. Fountain, Colorado	MM Docket No. 84-385 File No. BPH-820520AP
Louis Foreman Allen Widefield, Colorado	MM Docket No. 84-386 File No. BPH-820825AH
For Construction Permit for a New FM Station	

Appearances

Harry G. Sells on behalf of B&D Wireless Radio, Inc.; *Russell C. Balch* on behalf of Louis Foreman Allen.

DECISION

Adopted: July 29, 1985; Released: August 2, 1985.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL.

BOARD CHAIRMAN MARINO:

1. On March 1, 1985, B&D Wireless Radio, Inc. filed a brief and exceptions to the Administrative Law Judge's conclusions that B&D was disqualified because of willful misrepresentation about the availability of its public file and that the competing application of Louis Foreman Allen for Widefield, Colorado, was entitled to decisive 47 CFR §307(b) community and efficiency preferences. B&D did not except, however, to the conclusion that the competing applicant, Louis Allen, was superior on the standard comparative factors of diversification and best practicable service. See Initial Decision of Administrative Law Judge Miller, FCC 85D-7, released January 30, 1985. Subsequently, on March 14, 1985, B&D filed a motion to withdraw all of its exceptions "other than [on] the issue of disqualification" pursuant to a joint request for approval of settlement agreement entered into between the two remaining applicants, B&D and Louis Allen. In a reply brief Louis Allen supported B&D's request for relief. The Board will not approve a settlement agreement which is contingent on "the irrelevance of examining a dismissing applicant's character qualifications", *Hanover Radio, Inc.*, 91 FCC 2d 849, 852 n. 4 (Rev. Bd. 1982). However, to avoid any further delay we have reviewed the record and B&D's exceptions and affirm the ALJ's selection of the application of Louis Allen as clearly superior for both Section 307(b) and standard comparative reasons.

2. In essence, the present procedural posture of the case is that B&D has agreed to dismiss its application with prejudice if the Board determines that its "misconduct warrants only a comparative demerit in lieu of disqualification" on candor and character grounds. Louis Allen, the competing applicant, in its Reply supports B&D's position urging that the public would be served by assessing B&D a comparative demerit instead of disqualification and that disqualification of B&D was not required by law. Commission Policy and practice set out in *Allegan County Broadcasters, Inc.*, 83 FCC 2d 371 (1980), mandates against resolving basic character or candor issues concerning an applicant which proposes to dismiss its application. See *Hanover Radio, Inc., supra; South Bay Broadcasting Company, Inc.*, FCC 85M-1619, released April 15, 1985, and cases cited therein. As the Commission recognized in *Allegan, supra* 83 FCC 2d at 373, to the extent that the dismissing applicant may involve an existing Commission licensee, allegations of misconduct "may be revisited in a license renewal". B&D's settlement agreement, and motion to withdraw exceptions, will therefore be dismissed without prejudice.

3. We note that B&D has not excepted to the findings regarding its opponents' comparative superiority. We hereby adopt the ALJ's findings and conclusions on the Section 307(b) issue, and therefore to the extent not superseded by its non-compensatory settlement agreement to dismiss its application, B&D's exceptions to the Section 307(b) issue are denied.

See Mighty-Mac Broadcasting Co., FCC 85R-53, released June 26, 1985 (Rev. Bd.); *Sunshine Broadcasting, Inc.*, FCC 85R-52, released June 26, 1985; and *Archilla-Marcocci Spanish Radio Co.*, FCC 85R-63, adopted July 29, 1985 (Rev. Bd.).

4. ACCORDINGLY, IT IS ORDERED, That the "Motion for Withdrawal of Certain Exceptions filed March 14, 1985, by B&D Wireless, and the Joint Request for approval of settlement agreement filed March 14, 1985, ARE DISMISSED; that the application of B&D Wireless Radio Inc. IS DENIED; and that the application of Louis Foreman Allen, BPH-820825H, at Widefield, Colorado IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

FCC 85D-7

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
B&D Wireless Radio, Inc. Fountain, Colorado	MM Docket No. 84-385 File No. BPH-820520AP
Louis Foreman Allen Widefield, Colorado	MM Docket No. 84-386 File No. BPH-820825AH
For Construction Permit for a New FM Station	

Appearances

Harry G. Sells on behalf of B&D Wireless Radio, Inc.; *Russell C. Balch* on behalf of Louis Foreman Allen; and *Stephen Yelverton* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
WALTER C. MILLER

Issued: January 25, 1985; Released: January 30, 1985

Preliminary Statement

1. Two mutually-exclusive applicants are vying for the right to operate a new Class A FM broadcast station on 106.3 MHz (Channel 292). B&D Wireless Radio, Inc. (B&D) would operate at Fountain, Colorado, while Louis Foreman Allen (Allen) would establish his station at Widefield, Colorado.

2. The case was designated for hearing on May 3, 1984. See 49 F.R. 19114 published May 4, 1984. After the interlocutory pleading cycle had run its course, the following issues needed to be resolved:[1]

1. To determine whether B&D's local public inspection file was available in the Public Library at Fountain, Colorado, on May 30, June 6, and June 13, 1984, as B&D has represented, and if not, what effect that misrepresentation has on

[1] For the purposes of organizing this Decision the issues have been renumbered.

B&D's basic and/or comparative qualifications to be a Commission licensee;[2,3]

2. To determine: (a) the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of proposals would best provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis best serve the public interest; and

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applicants should be granted, if any.

3. We held the prehearing conference on August 9, 1984, and the hearing on October 22, 1984. The evidentiary record was closed on October 22, 1984. B&D and Allen filed their Proposed Findings on December 21, 1984, and Reply Findings on January 4, 1985.

Findings of Fact

Issue 1 - B&D's Public File Misrepresentation Issue

4. From the outset B&D has displayed a supercilious attitude towards complying with the Commission's reporting and public file requirements.[4] B&D filed its FM application for Fountain on May 20, 1982. At that time it was obligated to keep a copy of its public file at a location in Fountain.[5] But Robert Greenlee of B&D decided to maintain that file in Boulder — some 90 miles away.[6] (Tr. 74, 101) Greenlee made this decision against the advice of counsel and the public file was kept in Boulder until June 23, 1984 (Tr. 206-210, and 215-217).

5. This proceeding was designated for hearing on May 4, 1984, and on May 14, 1984, the Presiding Officer reminded each of the applicants that they had to comply with 47 CFR 73.3594's local-notice-of-hearing requirements. See 49 F.R. 19114 *supra.*, at para. 29, and FCC 84M-2274, released May 14, 1984 at para. 2.

6. On May 16 or 17, 1984, B&D's counsel sent a letter to B&D principal Ray Skibitsky,[7,8] along with a copy of a local notice counsel had prepared.

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[2] See FCC 84M-3093 released June 16, 1984.

[3] One of the dates involved was clarified at Tr. 7-8.

[4] Three of B&D's four principals are experienced broadcasters. But it is not clear whether it is their experience which is at the root of their disdain.

[5] See 47 CFR 73.3580(f)(g) and 73.3526.

[6] Originally the Presiding Officer was led to believe that Boulder was 120 miles away from Fountain. See FCC 84M-3093 *supra.*

[7] B&D principals Robert Greenlee and Diane Greenlee were out of the country from May 7 through May 21, 1984 (Tr. 88-89, 116-117, 197).

He instructed Mr. Skibitsky to publish the required hearing notice in a Fountain newspaper and to place B&D's local public inspection file in Fountain (Tr. 115, 120-122, 125, 146-147, 202). The local notice counsel had prepared represented that the public file was in the Fountain Public Library.

7. Ray Skibitsky then contacted B&D's fourth principal, his wife Betsy Skibitsky. He told her to retype the hearing notice and have it published in Fountain.[9] (Tr. 147, 152) He also set a stockholder's meeting for May 24, 1984. Betsy Skibitsky retyped the hearing notice. She assumed the notice was accurate, and that the public file was in fact in the Fountain Public Library.

8. The stockholders held their May 24, 1984 meeting. All four stockholders were present: Robert Greenlee, Diane Greenlee, Raymond Skibitsky, and Betsy Skibitsky. At that meeting Robert Greenlee gave Betsy Skibitsky the Public Notice of Hearing and instructed her to take such notice to Fountain for publication (Tr. 126, 200-201, 218). He claims he also gave her the local public inspection file and told her to take that to Fountain (Tr. 205-206; but see Footnote 9 *supra.*)

9. Betsy Skibitsky traveled to Fountain on May 26. She arranged to have the hearing notice published on May 30, June 6, and June 13, 1984. But she didn't take the public file with her because she believed what the hearing notice said; i.e., that the public file was already in the Fountain Public Library (Tr. 118-119, 125, 147-148, 150, 156-157). Robert Greenlee claims he may have duplicated Betsy Skibitsky by later mailing a copy of the hearing notice to the newspaper with instructions for publication (*Cf.* 205-206, with Tr. 218-221). That claim is rejected. Once sequestration was ordered (Tr. 65-66), Robert Greenlee's testimony became a maze of inconsistencies. This will be discussed *infra.*

10. On June 14, 1984, Allen (B&D's opponent) moved to enlarge the issues against B&D. It directly challenged the representation in B&D's public hearing notice that "[a] copy of the application of B&D Wireless Radio, Inc., Amendments and related material are on file for public inspection during normal business hours at the Public Library in Fountain, Colorado." Allen proffered the affidavits of three different librarians who swore that B&D's application was not on file at the

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[8] During discovery B&D was later asked to identify all documents relating to the location or placement of the public inspection file. It refused to identify this letter, and even denied the letter existed. See Allen Ex. 11, Q.7; Allen Ex. 12, p. 3; and Allen Ex. 13, p. 2, Interrogatory 4 and p. 3; Interrogatory 7. This covert abuse of discovery will be discussed *infra.*

[9] Keep in mind that it is Betsy Skibitsky that B&D asserts will be the President of the corporation and General Manager of the proposed station.

Fountain Public Library on May 31, June 2, June 5, and June 7, 1984.[10]

11. The following day, June 15, 1984, Betsy Skibitsky told Robert Greenlee that Allen's allegations were true; i.e., that the public file wasn't in the Fountain Public Library as they had represented. On Saturday morning, June 16, 1984, Robert Greenlee and Betsy Skibitsky met in Greenlee's office. They made copies of the material they wanted to place in the local public inspection file. Greenlee then instructed Betsy Skibitsky to take the file to Fountain and place it in the Public Library. He then went on a weekend camping trip with his wife, Diane Greenlee, and didn't return to work until June 18, 1984.

12. On June 18, 1984, Betsy Skibitsky went to Fountain. However, she wasn't able to place the public inspection file in the Public Library because it was closed. The following day, on June 19, 1984, Robert Greenlee and B&D's counsel held a telephone conversation. Greenlee told counsel that the public inspection file was in the Fountain Public Library (Tr. 204).[11]

13. In any event on June 19, 1984, B&D's counsel filed an Opposition to Allen's enlargement request. There he tried to explain away the past mishandling of the public file,[12] and indicated that the problems had been cleared up and "[i]t is now in the Library at Fountain." On June 23, 1984, Betsy Skibitsky again journeyed to Fountain and for the first time placed B&D's public file in the Fountain Public Library. Whether that public file contained updated and accurate information will be discussed *infra.*

14. But B&D's misrepresentations and evasions on the subject didn't end on June 19, 1984. The Presiding Officer added the public file issue against B&D on July 11, 1984.[13] See FCC 84M-3093 released July 16, 1984. Shortly thereafter, on July 30, 1984, Allen served a set of written interrogatories on B&D (Allen Ex. 11). B&D's responses and/or objec-

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[10] To this day B&D has never published an accurate local hearing notice. It has never remedied its admitted inaccuracy.

[11] Robert Greenlee gave three different versions of what he told his Washington counsel. At one point Greenlee says that during the June 19th telephone conversation he told Sells that the public file wasn't in the Fountain Public Library yet but "She's (Betsy Skibitsky) going to make sure that it's there today" (Tr. 231-232). At another point Greenlee says he told Sells on June 19th that the public file was *not* in the Fountain Public Library (Tr. 242-243). The above version is being credited because the Presiding Officer chooses to believe that Harry Sells, as an officer of the Court, wouldn't knowingly lie in a pleading filed with this Commission.

[12] B&D argued that it had previously had to maintain the local public file at Boulder instead of Fountain because " . . . [n]o business establishment, restaurant, or government office wants to be responsible for it." At the hearing, it developed that between the date the application was filed and the date the case was designated for hearing, B&D had made little or no effort to place the public file anywhere in Fountain (Tr. 74, 101, 129-130, 206, 210, 212-213, 215-217).

[13] Robert Greenlee became aware that B&D's counsel had misrepresented the location of the public file in its June 19, 1984 Opposition well before July 11, 1984, but B&D made no attempt to correct the representations in its June 19th opposition. See Tr. 238-244.

tions to those interrogatories were due on or before August 13, 1984. August 13th came and went, and B&D neither answered nor objected. So, on August 22, 1984, Allen filed a Motion to Compel. But in the meanwhile (on August 21, 1984), B&D filed an untimely and unsatisfactory set of answers to Allen's questions (Allen Ex. 12). This caused Allen to file a supplemental motion to compel. Again B&D neither answered nor objected. It remained totally silent. So the Presiding Officer granted Allen's supplemental motion and ordered B&D to provide full and complete answers to Allen's questions. See FCC 84M-3952 released September 17, 1984. B&D then filed a Supplement to Responses (Allen Ex. 13).

15. It subsequently developed that the answers B&D gave in both its Responses to Interrogatories and its Supplement to Responses to Interrogatories were inconsistent with the hearing evidence. For example, at Allen Ex. 11, p. 3, Q. 3, Allen asked B&D to identify its principal or principals who prepared and approved the local public notice of hearing and to give the date on which such approval was given.

16. Originally B&D stated that Harry Sells had prepared and approved the public hearing notice but it did not indicate when he did so (Allen Ex. 12, p. 2). Later, B&D said that Sells prepared, approved, and sent the public notice to Ray Skibitsky on May 16, 1984 (Allen Ex. 13, p. 2). But at the hearing it developed that Robert Greenlee and Betsy Skibitsky had also approved the public hearing notice on May 24, 1984 (Tr. 127, 149).

17. Allen also asked B&D to identify the principal or principals who had arranged to publish the public notice of hearing in the Fountain newspaper. B&D said it was Robert D. Greenlee, and that Greenlee had sent a copy of the public notice to the Fountain newspaper advising them to publish. However B&D furnished no dates and further stated Greenlee had not transmitted any correspondence to the newspaper - just the public notice (Allen Ex. 11, p. 3; Ex. 12; p. 2; and Ex. 13, p. 2).[14] However, at the hearing it developed that it was Betsy Skibitsky who physically delivered the public notice of hearing to the newspaper on May 26, 1984 (Tr. 118-119, 125, 147-148, 150, 157).

18. Next, Allen asked B&D to identify all documents that related to the location or placement of its local public inspection file. Allen specifically included in his request any correspondence between the applicant (its principals, attorneys, or representatives) and the newspaper in Fountain (Allen Ex. 11, pp. 4-5). B&D responses made no reference to Sells May 16, 1984 letter to Raymond Skibitsky (see Finding 6 *supra.*) or the written instructions that Robert Greenlee allegedly transmitted to the Fountain newspaper concerning publication of the hearing notice (Allen

[14] It strains credulity to believe that as a businessman and experienced broadcaster Robert Greenlee would have published the hearing notice in this fashion.

Ex. 12, pp. 3-4; Ex. 13, p. 3; Tr. 115, 120-122, 125, 146-147, 202-203, 218 and 220).

19. In an effort to verify B&D's representation that it had tried to place the public file in Fountain but had been unsuccessful because " . . . [n]o business establishment, restaurant, or government office wants to be responsible for it",[15] Allen asked B&D to identify the entities that it had asked to take that responsibility (Allen Ex. 11, pp. 3-4). Initially B&D replied that the businesses and agencies described were "unknown" (Allen Ex. 12, p. 2). Later, B&D indicated that its counsel had telephoned a real estate firm, a restaurant, and a hardware store in Fountain whose names he could not remember, and none of them wanted to assume responsibility for the public file (Allen Ex. 13, p. 2). At the hearing it developed that prior to May 26, 1984, B&D had never made any real effort to place its public file in the proposed community of license (Tr. 215-217).

20. In addition to the misrepresentations in the public hearing notice (Findings 4-9 *supra.*), and in pleadings before the Commission (Findings 14-19 *supra.*), B&D continued to misrepresent the facts in the sworn *written* direct testimony it submitted in this case. In an apparent effort to circumvent an inquiry into the public file question, Robert Greenlee swore that he " . . . was out of the country when the public notice of hearing was published." B&D Exhibit 8. He later admitted that his sworn testimony wasn't true (Tr. 201-202).

Issue 2 - The 47 USC 307(b) Issue

21. B&D proposes Fountain, Colorado, as its community of license. Louis Allen would serve Widefield, Colorado. Under Issue 2 before we look at the attributes of each community we must determine the areas and populations that would receive 1 mV/m or greater primary service from each proposal. The following chart shows that Allen would serve over twice as many people as B&D.

CHART

Applicant	*Area (Sq. Mi.)*	*Population*
B&D	342	124,574
Louis Allen	671	288,282
Common	299	124,335
B&D exclusively	43	239
Louis Allen exclusively	372	175,699

22. Five or more existing FM stations provide primary aural service to all of the areas within the proposed 60 dBu predicted contours of both B&D and Allen (B&D Ex. 6, p. 8, Jt. Ex. 1, para. 1).

[15] See Footnote 12 *supra.*

23. *Fountain.* Fountain, Colorado had a 1980 Census population of 8,324 people. 8.1% of the population is black, and 11.9% are of Spanish origin. It has a mayor-city council type of government.

24. There are 342 retail, service and professional businesses in Fountain. It has two grade schools, two junior high schools and one high school. There are 3.31 person per household there. The community has all of its own city services such as fire, police and welfare services. A number of civic groups and organizations are located there: the Chambers of Commerce, Rebecca Lodge, Masonic Lodge Kiwannis, Veterans of Foreign Wars, 4-H Clubs, and the Grange.[16] The community of Fountain has no local aural broadcast service.

25. *Widefield.* Widefield had a 1980 census population of 9,548 people (Allen Ex. 9; Jt. Ex. 2). 9.2% of the population is black, and 3.5% is Asian, and 7.8% is of Spanish origin. The population is about 51% female and 49% male. It is a young community. 37.7% of Widefield's residents are under age 18 while only 1.9% are 65 and over.

26. The following chart outlines the commercial activity in Widefield:

CHART

Type of Activity	*Number of Businesses*	*Estimated Number of Employees*
Industry	1	150
Wholesale/Distribution	1	20
Retail	21	182
Services/Contractors	12	68
Financial	7	33
TOTAL	42	453

27. Three dentists and three veterinarians practice in Widefield, and accounting services are available. It has a church, its own outdoor and indoor recreational facilities, and its own public libraries. Widefield School District No. 3 operates Widefield's public schools which had an enrollment of 6,353 students as of May 30, 1984. The school district maintains 13 buildings, and employs about 650 people including about 340 teachers and counselors.

28. The El Paso County Sheriff's Department provides patrol and investigation services in Widefield. The Security/Widefield Volunteer Fire Department provides fire protection and rescue squad services and maintains a separate fire station in Widefield. The Colorado Springs Department of Public Utilities supplies electric power while natural gas is

[16] The Prehearing Order in this case admonished both applicants to come forward with full and complete 307(b) evidence on Fountain and Widefield, Colorado. See FCC 84M-2274, released May 14, 1984 at para. 5. B&D elected not to do so for Fountain. Accordingly, B&D's 307(b) analysis is sorely lacking and it is no one's fault but its own. We do know of one thing that B&D has failed to mention in its 307(b) presentation. There is a weekly newspaper printed in Fountain. See Allen Exhibit 8.

provided by People's Natural Gas Company. The Widefield Homes Water and Sanitation Company provides water and sewer services.

29. There are no newspapers, magazines or other periodicals published in Widefield. Most importantly, there are no radio or television stations licensed to that community.

Issue 3 - The Standard Comparative Issue

Description of the Applicants

30. *B&D Wireless Radio, Inc.* B&D purports[17] to be a Colorado corporation with four stockholders and 1000 shares of stock outstanding. The following chart shows the details on those four principals:

CHART

Stockholder	*Office*	*Director*	*Percentage of Stock Ownership*
Betsy Skibitsky	President	Yes	35%
Diane M. Greenlee	Vice-President/Treasurer	Yes	35%
Raymond Skibitsky	Vice-President	Yes	15%
Robert D. Greenlee	Vice-President	Yes	15%

31. *Louis Foreman Allen.* Allen is prosecuting BPH-820825AH as its sole proprietor. He is the 100% owner.

Diversification of Mass Media

32. *Louis Foreman Allen* has no ownership or managerial interests in any mass media facility.

33. *B&D* itself has no broadcast or other mass media interests. However, three of B&D's four principals do. *Robert Greenlee* is President, Director and 45% stock owner of Centennial Wireless, Inc. Centennial is the licensee of KADE(AM) and KBCO(FM), Boulder, Colorado. Greenlee's 45% interest represents 50% control of the licensee because of the existence of non-voting treasury stock.

34. Robert D. Greenlee must also be charged with being the Vice-President, Director, and 30.5% joint owner of Mountain Wireless, Limited d/b/a KRVV, Vail, Colorado. See FCC 84M-2939, released June 29, 1984 at para. 2, and Fn. 2.

35. *Diane M. Greenlee* is presently the Vice-President, Director, Comptroller and 45% stock owner of Centennial Wireless, Inc., licensee of KADE(AM) and KBCO(FM), Boulder, Colorado. Her 45% interest represents 50% control of Centennial because of the existence of non-voting treasury stock.

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[17] The word "purports" has been used because B&D has placed several conflicting and inconsistent ownership claims on the record. This will be discussed in more detail when we reach B&D's quantitative integration claim, *infra.*

36. Mrs. Greenlee is also charged with being the Comptroller, Director and 30.5% joint owner of Mountain Wireless, Limited d/b/a KRVV, Vail, Colorado. See FCC 84M-2939, released June 29, 1984 at para. 2, and Fn. 2.[18]

37. *Raymond Skibitsky* is General Manager of Centennial Wireless, Inc., licensee of KADE(AM) and KBCO(FM). He has been either General Manager or Station Manager of those stations since 1974.

Integration of Ownership With Management

38. *B&D.* When it filed its Integration Statement in this case on May 29, 1984, B&D claimed 35% full-time integration and 65% part-time integration of ownership with management. It said it would fully integrate its President, Director, and 35% stockholder, Betsy Skibitsky into its day-to-day operations, and that Betsy Skibitsky would devote at least 40 hours a week to being General Manager of the proposed operation. She will be in charge of the station and direct all its functions.

39. B&D said it would partially integrate its Vice-President/Treasurer, Director, and 35% stockholder, Diane M. Greenlee into the proposed station's day-to-day operations. Diane Greenlee is to devote at least 20 hours a week to the position of Comptroller in charge of all the station's accounting and financial activities.[19]

40. On May 29, 1984, B&D represented that it would partially integrate its Vice-President/Secretary, Director, and 15% stockholder, Raymond Skibitsky into the proposed station's day-to-day operations.[20] Raymond Skibitsky will devote at least 20 hours a week in charge of the Sales Department and all corporate records.

41. Finally, in its May 29, 1984 integration proposal, B&D indicates that it would partially integrate Vice-President, Director, and 15% stockholder, Robert D. Greenlee into the proposed station's day-to-day operations. Robert Greenlee will spend at least 20 hours a week as the station's Program Director, and will be in charge of all programming personnel, format, and programming of the station.

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[18] Diane M. Greenlee is also an individual applicant for a new FM station at Glendale, Arizona, MM Docket No. 84-250, File No. BPH-820624AM. While her applicant status doesn't affect her diversification status in this case, it has a definite impact on her integration pledge in this case.

[19] In both the May 29, 1984 Integration Statement and in her direct testimony, Diane Greenlee's integration pledge was unqualified and unequivocal. However, at the hearing (Tr. 78-79), she testified that if she's granted a CP for Glendale, Arizona (See Footnote 17), she will sell her B&D stock, move to Glendale, and devote full-time to managing and operating her Glendale station. So her Fountain integration pledge, if any there be, is contingent on the denial of her Glendale application.

[20] B&D Exhibit 1 doesn't show Raymond Skibitsky as being B&D's Secretary.

42. In the sworn direct testimony it exchanged on September 27, 1984, it repeated this 35% full-time - 65% part-time quantitative integration claim (B&D Exs. 1-5).

43. B&D's integration claim will be rejected. It has failed to demonstrate that its claim is a viable accurate representation of how ownership will integrate with management. In fact the record shows that B&D has no intention of meeting its integration pledge.

44. After it filed its May 29, 1984 integration statement, but before it filed its written direct testimony on September 27, 1984, B&D prepared its corporate report for the State of Colorado. It prepared the report on September 3, 1984, and filed it with the State of Colorado on September 25, 1984, just two days before it exchanged its sworn testimony. That corporate report presents a completely different picture of B&D (See Allen Ex. 16).

45. B&D represented to the State of Colorado that it is authorized to issue 50,000 shares of common stock and has already issued 10,000 of those shares. This is a far cry from 1,000 shares B&D told the Commission it has issued (Tr. 72, 85, 99, 170, 174).

46. B&D told the State of Colorado on September 25, 1984, that its President was Diane Greenlee, but told the Commission on September 27, 1984 that its President was Betsy Skibitsky. It told the State of Colorado that Betsy Skibitsky is B&D's Vice-President and Treasurer, but represented to the Commission that Diane Greenlee is B&D's Vice-President and Treasurer.

47. On September 25, 1984, B&D represented to the State of Colorado that Robert Greenlee is Secretary of B&D.[21] Two days later it represented to the Commission that Robert Greenlee is Vice-President of B&D. On September 27, 1984, B&D represented to the Commission that Raymond Skibitstky is Vice-President and Secretary of the applicant, while two days earlier he wasn't shown as holding any office in the Colorado corporate report.

48. There are other inconsistencies that vitiates B&D's integration claim. At the hearing Allen's counsel showed Robert Greenlee an amendment to its application that B&D filed on August 3, 1982. That amendment was purportedly signed by Robert Greenlee *as President of B&D.* When shown the amendment Greenlee denied it was his signature[22] (Tr. 193-194).

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[21] However, in the Colorado Corporate report Robert Greenlee signed in the capacity of Vice-President.

[22] This is incredible. In an effort to rehabilitate B&D's integration proposal, Robert Greenlee was willing to either (1) admit that an amendment to its application was fraudulently filed, or (2) lie about the signature affixed to that amendment.

49. Similarly, Allen's counsel showed Robert Greenlee an amendment to its application that B&D filed on November 30, 1982. That amendment was also purportedly signed by Robert Greenlee, *President of B&D.* Again Greenlee denied the signature is his (Tr. 194-195).

50. The foregoing (Findings 38-49 *supra.*) demonstrate that B&D cannot be relied upon to carry out its integration pledge. Consequently, it will be credited with 0% integration.[23]

51. *Louis Foreman Allen.* Allen claims 100% quantitative integration. As an individual applicant Allen will devote a minimum of 40 hours a week to the proposed Widefield station in the combined capacity of General and Sales Manager. In those positions he'll be responsible for and supervise the station's business affairs, broadcast operations and personnel. Allen will make all the policy and management decisions affecting the station's activities and operations. For the past four years he has resided at 411 Lakewood Circle, Colorado Springs; i.e., within the 1 mV/m contour of the proposed Widefield station. He intends to maintain that residence.

52. Louis Foreman Allen was born in Danville, Illinois on October 19, 1922. After high school he received a BA in Business Administration from Indiana University, Bloomington, Indiana.

53. Allen was active in the broadcasting field from 1953 to 1975, almost exclusively in broadcast sales. He has been an Account Executive, and Commercial manager for several stations throughout the country. For example, he has been employed with WABC-TV, New York; WABC-AM, New York; WBBM(AM), Chicago; WMAQ(AM), Chicago, and WMUR-TV, Manchester, New Hampshire. In 1974 and 1975, he was employed by CBS Radio Spot Sales in Chicago as an Account Executive. There he sold radio-time for CBS-owned and operated stations.

54. In 1975, Allen purchased a seat on the Chicago Board of Trade,[24] and between 1975 and 1980, he traded in securities on his own behalf; i.e., he was never a broker trading for the public, he traded for his own account. He retired in 1980 (Tr. 257-260). During 1983-84, Allen took 27 hours of courses from the Broadcasting Department of the Pikes Peak Community College in Colorado Springs. This included on-the-air training at KEFC-FM. He has also donated his services as a guest lecturer at the College; he has lectured broadcasting classes on sales and agency organization.

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[23] Since B&D's entire integration claim is being disallowed there is no need to make findings on the qualitative attributes or the lack thereof of B&D's individual principals. So no findings have been made on such comparative factors as B&D's partial female enhancement, the non-residence of its principals, or their lack of local civic activity. Of course, if *comparative* areas and population needed to be considered, Louis Allen has a distinct advantage. See Finding 21 *supra.*

[24] Allen also has a seat on the New York Stock Exchange (Tr. 260).

Auxiliary Power

55. Louis Foreman Allen proposes to install auxiliary power generators at the station's studio and transmitter locations in order to maintain continuous operation during power failure. B&D does not (Allen Ex. 3, p. 3).[25]

The Viability of B&D's Application

56. Even if we *assume* that B&D could prevail under the three issues designated against it (see para. 2 *supra.*), its application would still have to be denied. It is impossible to grant B&D's application in its present state. The application is inaccurate, incomplete and based on what B&D admits are fraudulently filed materials.[26]

57. First, none of B&D's four principals reside at the residences set out in B&D's application. Stated another way the residences of all four of B&D's principals that are set out in B&D's application do not match the residences set out in B&D's direct case (Tr. 70-71, 96-97, 133-134, 167).

58. Next, B&D amended the engineering portion of its Fountain application on July 14, 1982. However, the engineering material B&D submitted bore no relationship to its Fountain proposal. Rather the proffered engineering material was for Diane Greenlee's Glendale, Arizona application (Tr. 68-69, 168-169).

59. Finally, B&D submitted two amendments on August 3, 1982, and November 30, 1982. Those amendments were purportedly signed by Robert D. Greenlee, as President of B&D. But when he was asked about those amendments in each instance he denied the signature was his (Tr. 193-195).[27]

Conclusions of Law

1. Two mutually-exclusive applicants seek the right to operate a new Class A FM broadcast station on 106.3 MHz (Channel 292). B&D Wireless, Radio, Inc. (B&D) would operate out of Fountain, Colorado (1980 population - 8,324), while Louis Foreman Allen would license his facility to Widefield, Colorado (1980 population - 9,548).

2. At the hearing, evidence was adduced on three issues: (1) B&D's public file misrepresentation issue (Issue 1); (2) the 47 USC 307(b) issue;

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[25] B&D devotes a portion of its Proposed Findings and Conclusions to nonissues; i.e., question that both the Chief, Audio Services and the Presiding Officer have ruled are not in the case. See e.g., Findings 2, 19, 20, 23. Stated another way, the questions whether Widefield is a community for 47 USC 307(b) purposes, and whether Allen's 3.16 mV/m contour covers all of Widefield are not part of this proceeding.

[26] B&D was urged to amend and correct its application; i.e., to get it into viable form. It apparently agreed to do so (Tr. 67-68). But it never has.

[27] Similarly when Greenlee was shown the July 14, 1982 amendment (see Finding 58 *supra.*) his reaction was: "I remember the amendment but I do not recall if this was my signature" (Tr. 168).

and (3) the contingent standard comparative issue. In addition, and because of evidence adduced during the course of the hearing, a question has arisen about the viability of B&D's Fountain application.

3. B&D's misrepresentation issue must be decided first. For it is axiomatic that only basically qualified applicants are entitled to either a 307(b) comparison or a standard comparative analysis. See e.g. *Louis Adelman,* 29 FCC 1223, 18 RR 1062 (1060) *affirmed sub. nom. Guinan v. Federal Communications Commission,* 297 F.2d 782, 22 RR 2026 (1961).

Issue 1 - B&D's Public File Misrepresentation Issue

4. This issue must be resolved adversely to B&D. B&D filed its Fountain FM application on May 20, 1982. At that time it knew it was obligated, under the Commission's rules, to maintain a public file in Fountain, its proposed community of license. But Robert Greenlee, against the advice of counsel, refused to do so. Instead B&D maintained the file in Boulder, Colorado, some ninety miles away.

5. After this proceeding was designated for hearing, B&D was obligated under the Commission's Rules, to publish a local notice of hearing. It purported to do so. On May 31, June 6, and June 13, 1984, it ran a notice in the El Paso County Advertiser and News. And in those ads it represented to the public, and to the Commission, that "a copy of the application of B&D Wireless Radio, Inc. Amendments and related materials are on file for public inspection during normal business hours at the Public Library in Fountain, Colorado."

6. This representation proved to be false. On June 14, 1984, Louis Foreman Allen challenged the truthfulness of the ad and proffered the affidavits of three different librarians who swore that B&D's public file was not in the Fountain Public Library on May 31, June 2, June 5, and June 7, 1984.[28]

7. On June 19, 1984, B&D responded to Allen's challenge. In essence it admitted that Allen was correct; i.e., that the public file representation contained in its local notice of hearing was inaccurate. But it offered a reason for the past mishandling of the file, and indicated that all problems had been cleared up since "[i]t is now in the Library at Fountain." This further representation turned out to be false, as did the reason B&D gave for the past mishandling.

8. But B&D's misconduct didn't end there. After a public file misrepresentation issue was added against it, B&D first attempted to stonewall the discovery attempts that Allen initiated. When that failed it gave evasive and less-than-candid answers to Allen's interrogatories. Later, in its written direct case, B&D again tried to circumvent a public file inquiry by presenting the testimony of only *one* of its principals,

[28] B&D never did file a correct and accurate notice of hearing.

Robert Greenlee on the subject. On cross-examination it developed that *three* of B&D's four principals had first-hand knowledge of the facts underlying B&D's misrepresentations. Even Robert Greenlee in his written testimony tried to evade questioning on the problem. He falsely swore that he "...was out of the country when the public notice of hearing was published."

9. The Commission cannot and should not tolerate this disdainful approach to its reporting requirements. In this deregulatory era the Commission doesn't demand much in the way of information from its applicants and licensees. But it does have a right to truthfulness in those few areas where it does request data. See *Radio Corrollton,* 52 FCC 2d 1173, 33 RR 2d 1125 (1975); *WIOO, Inc,* 54 FCC 2d 692, 34 RR 2d 1093 (Rev. Bd. 1975); and *3 J's Broadcasting Co.,* 41 FCC 2d 664, 27 RR 2d 1396 (Rev. Bd. 1973).

10. The FCC is now and always has been a small government agency in terms of personnel and resources. It is fundamental to the everyday functioning of its regulatory process for the Commission (and its delegated authority) must be able to rely on the representations of those whom it licenses and those who come before it seeking licenses. So the Commission not only has a right to, but it must demand candor from, those who come before it. And it must refuse to tolerate deliberate misrepresentation. See *FCC v. WOKO, Inc.* 329 US 223 (1946); *The Prattville Broadcasting Co.,* 4 FCC 555, 8 RR 2d 120, *reconsideration denied,* 5 FCC 2d 601; 8 RR 2d 1096 (1966); *Nick J. Chaconas,* 28 FCC 2d 231, 21 RR 2d 576 (1971) *reconsideration denied,* 35 FCC 2d 699, 24 RR 2d 811 *affirmed without opinion,* 486 F. 2d. 1314 (1974); and *Rocket Radio, Inc.,* 65 FCC 2d 589 (1977).

11. Since B&D has misrepresented relevant adjudicatory facts to and been less than candid with the Commission regarding the handling of its public file, its application must be denied.

Issue 2 - The 47 USC 307(b) Issue[29]

12. Since B&D is not basically qualified to be a Commission licensee, there is no need to evaluate Allen and B&D's proposal under 47 USC 307(b). But *assuming* a 307(b) analysis were needed, Louis Foreman Allen's application would be granted. Allen's proposal for Widefield is not only more efficient, he would bring a first local transmission outlet to the larger community. See *Affinity Communications Inc.,* 96 FCC 2d 685, 56 RR 2d 510 (Rev. Bd. 1984); *Cornwall Broadcasting Corp.,* 89 FCC 2d 704,

[29] Were it necessary to proceed beyond the basic qualifying issue, the 307(b) issue must be decided next. For it is only if 307(b) isn't determinative that the *contingent* comparative issue comes into play. See *FCC v. Allentown Broadcasting Co.,* 349 U.S. 358, 361-362, 75 S.Ct. 855, (1955) and *Robert J. Reverman et. al.,* 78 FCC 2d 1110 (Rev. Bd. 1980), *review denied* FCC 80-739, released December 11, 1980.

51 RR 2d 389 (Rev. Bd. 1982).[30]

Issue 3 - The Contingent Comparative Issue

13. Since B&D is not basically qualified to be a Commission licensee, and since in any event it would provide a fairer and more equitable distribution of radio facilities to grant the Widefield proposal under 47 USC 307(b), there is no need to make a standard comparative analysis. But *assuming* one were made, Louis Foreman Allen would easily prevail. B&D would be given a substantial demerit under the all important diversification of mass media, and Allen's 100% quantitative integration completely engulfs B&D 0% credit. In addition Allen would provide auxiliary power while B&D would not.

The Non-Viability of B&D's Application

14. This case is a total mismatch. B&D is not basically qualified to be a Commission licensee. Widefield is the preferred community under 47 USC 307(b). And Allen is the superior comparative applicant. But *assuming* that all of that wasn't so, it would still be inappropriate to grant B&D's application in its present condition. In its present state B&D's application is incomplete, inaccurate and fraudulently suspect.

SO unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, the application of Louis Foreman Allen (BPH-820825AH) IS GRANTED; and B&D Wireless Radio, Inc.'s application (BPH-820520AP) IS DENIED.[31]

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WALTER C. MILLER, *Administrative Law Judge*

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[30] It must also be kept in mind that B&D did not really put its best foot forward when it presented its 307(b) evidence. See Footnote 16 *supra*.

[31] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

Construction Permit Issuance of
Translator FM

Section 74.1232(d)(1) of the Rules does not proscribe the authorization of a commercial FM translator to the licensee of the primary station proposing to provide service outside that station's 1 mV/m contour and within the 1 mV/m contour of an unbuilt, non-operational commercial FM broadcast station assigned to a different principal community.
—*Ber-Tec B/cing, Inc.*

FCC 85-361

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of	
BER-TEC Broadcasting, Inc. Gold Beach, Oregon	File Nos. BPFT-800909IQ
KURY Radio, Inc. Gold Beach, Oregon	BPFT-800421IC
For Construction Permits for New FM Translator Stations	

MEMORANDUM OPINION AND ORDER

Adopted: July 9, 1985; Released: July 16, 1985

BY THE COMMISSION: COMMISSIONER RIVERA NOT PARTICIPATING.

1. The Commission has before it for consideration: (a) the above-captioned applications; (b) two Petitions to Deny by James N. Hoff, filed November 25, 1980; (c) staff letters, dated January 19, and February 24, 1984, denying the petitions to deny and granting these applications; (d) Petitions for Reconsideration by Chambers Broadcasting (Chambers), filed February 21, and March 23, 1984; (e) two staff letters dated June 6, 1984, denying the petitions for reconsideration; (f) two Applications for Review by Chambers, filed July 16, 1984; (g) an Opposition to Application for Review by BER-TEC Broadcasting, Inc., (BER-TEC) filed July 23, 1984; and (h) related pleadings and correspondence.

2. KURY Radio, Inc. (KURY Radio) and BER-TEC each filed an application for a new station-owned commercial FM translator to serve Gold Beach, Oregon, by rebroadcasting, respectively, the signals of their FM Broadcast Stations, KURY(FM), Brookings, Oregon, and KCRE-FM, Crescent City, California. On November 25, 1980, James N. Hoff (Hoff), who at that time had pending an application for a new first local commercial FM broadcast station at Gold Beach, Oregon (File No. BPH-800723AH), filed against each translator application a petition to deny alleging that its proposal violated Section 74.1232(d)(1) of the Commission Rules.[1] Hoff's FM broadcast station application was granted on January 27, 1981, and assigned the call sign KGBR(FM). Station KGBR(FM) still was not operational on January 19, and February 24, 1984, the dates of the staff's actions disposing of Hoff's petitions to deny these translator applications.[2] The staff concluded that the proscription in Section 74.1232(d)(1) of the Rules does not apply where the proposed station-owned FM translator is intended to provide reception within the predicted 1 mV/m contour of an unbuilt, non-operational commercial FM broadcast station. Thus, upon a finding that although Gold Beach, Oregon is outside the respective 1 mV/m contours of Stations KURY(FM) and KCRE-FM, it is not within the 1 mV/m contour of any operational commercial FM broadcast station, Hoff's petitions to deny were denied and the captioned translator applications were granted.

3. The construction permit for Station KGBR(FM) was assigned from Hoff to Chambers on February 8, 1983. Chambers petitioned for reconsideration of the staff's actions, alleging that although Station KGBR(FM) was not operational, the grant of these translator applications nevertheless contravened Section 74.1232(d)(1) of the Rules.[3] Reconsideration was denied on the ground that Chambers neither presented any new substantial or persuasive arguments which were not previously considered, nor

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[1] Section 74.1232(d) provides that "An authorization for a commercial FM translator which is intended to provide reception to places which are beyond the predicted 1 mV/m field strength contour of the primary station and within the predicted 1 mV/m field field strength contour of another commercial *FM radio broadcast station* assigned to a different principal community will not be granted to: (1) The licensee or permittee of an FM broadcast station. . . ." [Emphasis added.]

[2] Station KGBR(FM) is still not operational. A sixth request for extension of time to construct the station was filed May 15, 1985 (BMPH-850515IA).

[3] Since Station KGBR(FM) would compete for audience in Gold Beach, Oregon with these translator stations, and could suffer economic injury to the extent that audience is diverted, Chambers, as Hoff's successor-in-interest, had standing to petition for reconsideration of the staff's actions granting these applications, and has standing to file these applications for review. *See Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U.S. 470 (1940); Sections 1.106 and 1.115 of the Commission's Rules.

demonstrated any errors in the analysis of the facts or the authority supporting the staff's actions. *See* Section 1.106(a)(1) of the Rules.

4. In its application for review, Chambers requests consideration of whether the protection afforded licensees of commercial FM broadcast stations in Section 74.1232(d)(1) of our Rules extends to permittees of commercial FM stations which are authorized but not operational prior to the authorization of a station-owned FM translator. Chambers asserts that due to the size of the Gold Beach market, the intrusion of even one of these translators, which Chambers claims do not place 1 mV/m signals over the entire community, makes untenable the competitive position of Station KGBR(FM).[4] Chambers alleges that the authorization of these translators is contrary to the Commission's FM allocation policy of bringing full local aural service to all communities, and that there is no rational basis for not affording the permittee of a commercial FM station the same right to protection from interference to its proposed contours from a later-authorized FM translator as is accorded licensees.[5] Chambers takes the position that the termination provision in Section 74.1232(h) of our Rules does not adequately guard the viability of the initiation of a first local FM station against economic harm by an FM translator.[6] Finally, Chambers asserts that the authorization of these translators thwarts the Commission's public interest policy of obligating full service station licensees to serve their communities' needs and, instead, encourages regional concentration of control.

5. At the outset, we affirm that the term "FM radio broadcast station" in Section 74.1232(d) of our Rules,[7] encompasses only operational, and not unbuilt, stations. Accordingly, Section 74.1232(d)(1) proscribes the authorization of a commercial FM translator to the proposed primary station licensee or permittee only where the translator is intended to provide reception beyond the primary station's predicted 1 mV/m contour and within the predicted 1 mV/m contour of an *operational* commercial FM

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[4] We note that the Commission's Rules, 47 U.S.C. Sections 74.1201-.1284, do not prescribe minimum coverage requirements for FM translators, and that the extent to which these translators actually cover Gold Beach, Oregon is irrelevant to the issue herein.

[5] We note that Chambers claims, without evidentiary support, that there would be interference to Station KGBR(FM)'s signal from these translators pending their termination. Allegations concerning interference to a primary signal are irrelevant to the eligibility of a translator applicant under Section 74.1232(d) of the Rules. *See* Section 74.1203 of the Rules.

[6] Section 74.1232(h) provides that: "Any authorization for an FM translator station issued to an applicant described in paragraph (d) of this section will be issued subject to the condition that it may be terminated at any time, upon not less than 60 days written notice, where the circumstances in the community or area served are so altered as to have prohibited grant of the application had such circumstances existed at the time of its filing."

[7] *See* footnote one, emphasis added.

broadcast station assigned to a different principal community.[8]

6. Section 74.1232(d)(1) was incorporated into our FM translator rules in its current form at the time Part 74 was amended to include Subpart L. The underlying rationale for its inclusion was to prevent FM station licensees from using FM translators as a competitive means for extending their stations' service areas. *Report and Order* in Docket 17159, 20 RR 2d 1538, 1541 (1970). In recognition of the fact that FM translators are not being used primarily as "fill-in" devices or as means to provide service to unserved or underserved areas, we have twice explored amending Section 74.1232(d) in order to prevent unfair competition by distant commercial FM stations. In our *Notice of Proposed Rulemaking* in Docket 19918, 44 FCC 2d 794 (1974), we proposed to prohibit competitive expansion of an FM station's service area through either a licensee or non-licensee owned translator where the area to be served was within the predicted 1 mV/m contours of more than one FM station licensed to a community other than that of the primary station. Our main concern was to balance the need to protect the viability of local FM stations with Congress' intent that there be competition in the business of broadcasting. *Id.* at 795. In 1978, we revised our proposal in Docket 19918 to limit primary stations to owning and supporting translators which serve areas only within their 1 mV/m contours, and to permit all other applicants to establish FM translators without restriction as to their intrusion into the predicted 1 mV/m contours of full service commercial FM stations. *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* in Docket 19918, 43 FR 14695, published April 7, 1978.

7. Consideration of this revised proposal was ultimately concluded last year. Upon review of the record, we determined that our present limitations on FM station-licensee translator ownership and control are adequate. Thus, we declined to amend Section 74.1232(d) and left the rule intact in its current and original form. *Amendment of Part 74, Subpart L of the Commission's Rules Pertaining to FM Radio Broadcast Translator Stations,* 98 FCC 2d 35 (1984). Chambers argues, however, that our policy limiting the protection in Section 74.1232(d)(1) only to licensees of operational commercial FM broadcast stations will result in competitive economic clashes between first-in-time station-owned translators and subsequent first local FM service stations that will adversely affect the

[8] We note that in its reply to BER-TEC's opposition to application for review, Chambers argues that "the restrictions of the rule [Section 74.1232(d)(1)] apply *wherever predicted service exists,* not only where an FM station is in actual operation." [Emphasis in original]. The word "predicted" as used in Section 74.1232(d) is a technical term of art referring to an operating FM station's theoretically predicted contours calculated on the basis of its authorized power and antenna height, as opposed to its actual field strength measurements. The language does not refer to a distinction between an operational and a non-operational station.

viability of the latter stations. We are unpersuaded by this argument. Subpart (h) of Section 74.1232 was proposed in Docket 19918 to provide for retroactive application of subpart (d) "where the circumstances in the community or area served are so altered as to have prohibited grant of the application had such circumstances existed at the time of its filing." In the *Notice* proposing Docket 19918, we set forth an example of a possible future application of subpart (h) which clarifies the applicability of Section 74.1232(d)(1). We referred to a situation where, subsequent to the authorization of a station-owned FM translator serving an area beyond the primary station's predicted 1 mV/m contour more than one FM station *commences operation* in the latter community.[9] Subpart (h) may be invoked when a full service station licensed to the community being served by a translator begins operation. Therefore, the unbuilt, non-operational status of an FM station does not prohibit authorization of a translator to an applicant described in subpart (d).

8. The explication of this policy in *Peninsula Communications, Inc.*, 50 RR 2d 1135, 1136 (1982), demonstrates the interrelationship of subparts (d) and (h) of Section 74.1232. An FM station petitioned to terminate the operation of an FM translator owned by the licensee of the FM station being rebroadcast beyond its 1 mV/m contour. We stated that authorization of the translator issued to an applicant described in Section 74.1232(d) of the Rules "came within the purview of the termination provision of Section 74.1232(h) as soon as . . . [the full service FM broadcast station licensed to the community being served by the translator] *commenced operation.*" [Emphasis added]. We explained that "Section 74.1232(h) of the rules is permissive in nature and, therefore allows, but does not require, termination of a translator upon a proper showing that the competitive situation in a market is such that the translator is likely to spell the demise of a local full service FM station," and held that "the station's current status as an operating station is some evidence of its ability to survive." *Id.* at 1136-1137.

9. Chambers argues that the burden of the 60-day termination provision notice period, and the costs incurred in petitioning for termination of these translators after Station KGBR(FM) commences operation, would be sufficiently detrimental as to effectively preclude the initiation of this local service. However, applicants for new broadcast stations, as well as assignors of construction permits for unbuilt stations, certify that they have available sufficient net liquid assets to construct and operate the facility for three months without revenue. The additional costs of petitioning for termination of a translator are unlikely to impose a

[9] The reference to "more than one" FM station in this example parallels the proposal in Docket 19918 (discussed above) to amend Section 74.1232(d).

financial hardship sufficient to threaten the viability of a new station even in a small market.

10. Additionally, Chambers alleges that our policy "runs contrary to the theory of preference of a primary signal to a community over a secondary signal." It cities *Harriscope Broadcasting Corporation,* 38 FCC 2d 328 (1972), for the proposition that it is within the Commission's discretion to review the impact of a translator's operation on the operation of a full service station, and thus there is no assurance in the present case that the protection in Section 74.1232(d)(1) will ultimately be accorded Station KGBR(FM).[10] However, *review* of a petition for termination is not permissive. Rather, *Harriscope Broadcasting* and *Peninsula Communications* both make clear that upon review of changed circumstances, which, had they existed at the time the translator application was filed would have prohibited a grant, the Commission *may* determine that termination of the translator is not in the public interest. In *Harriscope Broadcasting* we concluded that the viability of the new local UHF-TV station could be ensured by protecting its programs against duplication by the TV translators serving the same community, and that the public interest in the availability of a wide choice of programs warranted maintaining the translators' authorizations. Thus, where translator service in a community preceeds the initiation of a first local FM service, there is an opportunity to assess whether there is a detrimental impact by the translator on the viability of the newcomer FM facility, or whether these stations can competitively co-exist, making available to the public a wider diversity of voices.

11. It is clear that the circumstances of this case do not activate the protection of Section 74.1232(d)(1). Not only was Station KGBR(FM) not operational at the time these translator applications were filed, but contrary to Chambers' representation in its applications for review, the construction permit for that station had not even been granted. Station KGBR(FM) has been authorized since January, 1981, and to this date, remains unbuilt and non-operational. The public interest is best served by permitting FM translator service beyond these primary stations' 1 mV/m contours by the station licensees pending the eventual commencement of operations by Station KGBR(FM).

12. In this regard, and in conclusion, we are unpersuaded by Chambers' argument that our policy for applying the proscription in Section 74.1232(d)(1) of our Rules eschews our policies against regional concentration of control. We note first that we recently repealed the regional concentration of control provisions of the multiple ownership rules. *See*

[10] *Harriscope Broadcasting* involved the application of Section 74.732(f) of the Rules, which is the termination provision for TV translator stations. Section 74.1232(h) parallels Section 74.732(f).

Multiple Ownership (Regional Concentration of Control Provision), 96 FCC 2d 578, 55 RR 2d 1389 (1984). Secondly, Section 74.1232(b) specifically provides that FM translators do not count for purposes of our multiple ownership rules. We reiterate that we believe that our policy best serves the public interest in aural FM broadcast service, our policy best serves the public interest in aural FM broadcast service, and conclude that retroactive application of Section 74.1232(d)(1) via Section 74.1232(h), where there is evidence of a detrimental impact by the translator on the new local FM facility, sufficiently guards against any threat of regional concentration of control or economic competition injurious to the public interest.

13. Accordingly, IT IS ORDERED, that the aforementioned Applications for Review by Chambers Broadcasting ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

License, Modification of
Lottery See Also Contest
Mutually Exclusivity, See Comparative Hearing

Commission affirmed using lotteries to select cellular radio licensees in markets beyond top-30 Metropolitan Statistical Areas. It rejected alternative licensing mechanisms, eliminated cumulative lottery chances for nonwireline applicants engaging in partial settlements in markets beyond the top-120, modified the ownership rules for corporate applicants and required applicants to obtain a firm financial commitment.

—*Cellular Radio Lotteries*
CC Docket No. 83-1096

FCC 85-117

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Amendment of the Commission's Rules To Allow the Selection From Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings	CC Docket No. 83-1096

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted March 14, 1985; Released May 3, 1985

BY THE COMMISSION:

I. Introduction

1. On April 11, 1984, we adopted a Report and Order in this proceeding implementing a system of lotteries for selecting cellular licensees from among mutually exclusive applicants in markets other than the 30-largest and modifying the cellular application rules to take into account the lottery selection process for markets beyond the top-90.[1] Pending are twelve petitions for reconsideration. Two of the petitioners request reconsideration of the use of lotteries urging, respectively, (1) that we

[1] Cellular Lottery Decision, 98 FCC 2d 175 (1984).

auction off cellular licenses and (2) that we reinstitute comparative proceedings for selecting licensees in certain 31-90 markets. A third petitioner urges that comparative proceedings be used in markets 91-120.[2] The remaining petitioners raise various issues relating to application filing and processing procedures for markets beyond the top 90 in a lottery selection regime including: (1) the rules governing "fill-in" applications for parts of Metropolitan Statistical Areas (MSAs) and New England County Metropolitan Areas (NECMAs) not included in the initial permittee or licensee's Cellular Geographic Service Area (CGSA); (2) the rule limiting to less than one percent the ownership of an applicant in a mutually exclusive application; and (3) the 2,000 square mile limit on an applicant's CGSA in non-MSA/non-NECMA areas. In addition, a few miscellaneous issues have been raised regarding various aspects of the *Cellular Lottery Decision* and will be dealt with herein.

2. We have carefully considered the petitions for reconsideration, comments and oppositions and reply comments. We affirm our decision to use lottery procedures to select cellular licensees from among competing applicants in all markets other than the top-30. We also affirm the basic regulatory structure established in the *Cellular Lottery Decision* for implementing the lottery process, particularly our policies regarding basic qualifying standards and pre-filing settlement agreements. However, we are modifying our policy regarding cumulative lottery chances for applicants entering into partial settlements to eliminate the cumulative chance for nonwireline applicants in markets beyond the top-120. We are also granting reconsideration of the 1% ownership rule for the beyond-120 markets and modifying it with regard to ownership interests in corporate applicants to adopt more practical attribution standards for corporate ownership interests. We also take this opportunity to clarify certain issues regarding the implementation of the basic qualifying standards for applications in markets beyond the top 90. Finally, we are adopting new guidelines for the form, organization and content of future applications, as discussed herein.

II. Discussion

A. Auctions

3. Henry Geller and Donna Lampert filed a petition suggesting that we adopt auctions rather than lottery selection procedures for all markets below the top-30. They state that auctioning off cellular authorizations

[2] On November 1, 1984, Bluegrass Broadcasting Co., Inc. filed a motion for leave to file supplementary comments by which it seeks to supplement the record in this proceeding with its analysis of actual fourth round applications. Based on this analysis, it requests reconsideration of the use of lotteries in markets 91-120 and urges comparative proceedings. We will grant Bluegrass' motion and accept its comments.

would allow mutually exclusive applicants to compete for the markets they desire most with the license going to the user who will pay the most for it and for whom the license is most valuable. They urge that this marketplace approach would assure the most efficient use of scarce and valuable spectrum resources—a significant public interest benefit—and allow cellular applicants to make rational application choices, in response to business and marketplace judgments, in lieu of government fiat.[3] Geller and Lampert contend, contrary to our conclusion in the *Cellular Lottery Decision* order,[4] that the Commission has the legal authority to implement auctions in common carrier services and that the public interest favors this approach.

4. In the *Notice of Proposed Rulemaking* in this proceeding,[5] we rejected the licensing alternative of auctioning off cellular authorizations to the highest bidder. In the *Cellular Lottery Decision,* we considered comments filed by Geller and Lampert urging, notwithstanding our conclusion in the *Notice,* that the public interest would be served by using auctions in the cellular service, particularly in preference to lotteries. We concluded that unlike our statutory authority to adopt lotteries, our legal authority to employ auctions is not clear.[6] On reconsideration, the petitioners have offered no new facts or arguments on the basic issue of whether the Commission has the legal authority to use auctions in the cellular service; to the contrary, they merely assert that we should so determine and proceed accordingly.

5. There is much to recommend the use of auctions as a licensing method in a new service such as cellular radio. That the right to operate a cellular system is a valuable privilege cannot be doubted. Thousands of applicants have filed in the hope of obtaining a construction permit through the comparative hearing or lottery processes. As the industry matures it will rapidly develop the ability to determine the market value of the right to operate a system of a given size. Yet, absent an auction, a construction permit is awarded without payment for the valuable privilege conferred. The winner of a permit reaps a windfall. An auction would discourage speculation by largely eliminating this windfall.

6. Moreover, the public at large would benefit from auctions of cellular authorizations because the permittee would compensate the people for the value of the privilege conferred, as with auctions of other public resources. An auction would also benefit the user public by making

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[3] We note also that an auction might enable us to delete the prescreening phase of application processing since it might be possible to have only the winning applicant for each frequency block in a market actually submit an application.

[4] Cellular Lottery Decision, *supra,* note 49 at paragraph 28.

[5] Cellular Lottery Notice, CC Docket No. 83-1096, 48 Fed. Reg. 51493, released October 28, 1983, at para. 30.

[6] See note 4, *supra.*

service available with less delay than the slow comparative hearing process or the lottery process, which is attended by massive application filings.

7. Notwithstanding these potential benefits, employing an auction at this stage could impose substantial costs on both the public and applicants for markets 91-120.[7] A decision to employ auctions would require a rulemaking as this licensing approach was not the subject of this proceeding and we have not had the benefit of full public comment. During the pendency of a rulemaking, the licensing of cellular service in markets 91-120 would be suspended and the acceptance and processing of applications for subsequent markets further delayed. The public as well as the applicant ultimately selected could suffer from the delay caused by this process. Furthermore, the ambiguity surrounding our legal authority to conduct auctions invites litigation which could further delay the licensing of cellular service in these markets. On balance, we conclude that changing the licensing mechanism for markets 91-120 at this time to auction off cellular licenses would not result in sufficient public benefit to offset the costs and delay necessary to implement that decision. With regard to markets beyond the top-120, the record before us is not sufficiently developed to conclusively decide the appropriateness of using auctions in these markets at this time. We reserve the right to revisit this question with regard to the licensing of cellular service in the beyond-120 markets at a future time if necessary.

B. Comparative Hearings

8. One petitioner requests reconsideration of our decision to use lotteries in lieu of comparative selection in certain 31-90 markets.[8] Harry J. Pappas and Fresno Mobile Radio, d/b/a California Portaphone, request reconsideration of lottery selection for the Fresno, California and Northeastern Pennsylvania markets.[9] Portaphone is an applicant for the Fresno

[7] Since we have virtually completed the licensing process for markets 31-90, we find it unnecessary to consider the effect of adopting auctions in those markets.

[8] By Order, released October 3, 1984, FCC 84-460, we denied the Request for a Stay of Effective Date of the Cellular Lottery Rules adopted in this proceeding filed by A. Bates Butler III and James A. Mather. Accordingly, we scheduled lotteries for markets 31-60 on October 3, and for markets 61-90 on October 23. However, due to the fact that full market settlements were achieved in all but two markets, we cancelled the October 3 lottery and held a lottery for the Fresno and Northeastern Pennsylvania markets on October 26. In these two markets, partial settlements including all but one applicant were achieved. (California Portaphone was the non-settling applicant in Fresno). In addition, on January 25, 1985, we held a lottery for the Salt Lake City market since the anticipated full-market settlement was not effectuated.

[9] California Portaphone initially filed its Petition for Reconsideration in this proceeding seeking the reinstitution of comparative selection in markets 31-90 urging that using lotteries is not proper for markets in which applications were filed in contemplation of

market. It asserts that the factors that gave rise to the Commission's decision to use lotteries are no longer present because, as a result of partial settlements, there are now only two mutually exclusive nonwireline applicants for each market; Portaphone argues, in these circumstances, lotteries will not advance the provision of service faster than comparative selection, and comparative consideration is necessary to ensure selecting the best applicant.

9. The essence of Portaphone's petition is that it believed it had a good chance of prevailing in a comparative evaluation for its hometown market. Accordingly, it applied only for that market and has no other interests to trade for a substantial or controlling interest in the settlement partnerships. Therefore it seeks comparative consideration. In the *Cellular Lottery Decision* order, we concluded that any slight benefit that the public might realize through comparative consideration in identifying marginally better qualified candidates is significantly outweighed by the expense, burden and loss of time that the consumer and the government will suffer.[10] We also found no compelling reason to retain the use of comparative hearings in particular circumstances or certain "unique" markets.[11] Portaphone has failed to demonstrate how the public would benefit from instituting a comparative proceeding for the Fresno and Northeastern Pennsylvania markets; on the contrary, its rationale contemplates only a purely private corporate benefit.[12] Portaphone's burden in this regard is particularly high given the fact that the prospect of lottery selection was the critical factor in causing the original applicants in Fresno and the original applicants in Northeastern Pennsylvania to achieve partial settlements leaving only two mutually exclusive applicants. To allow a "holdout" applicant to claim that lottery is no longer justified because a settlement fostered by the prospect of lottery selection has reduced the number of applicants, contravenes the public policy

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comparative consideration. We discussed this issue in *Cellular Lottery Decision* and Portaphone has offered no new facts or legal arguments requiring us to reexamine our conclusions. *Cellular Lottery Decision,* at paras. 13-16. Portaphone subsequently requested leave to file a Supplement to its Petition for Reconsideration in order to limit its challenge to lotteries to only those 31-90 markets in which full-market settlements had not been reached, i.e. Fresno and Northeastern Pennsylvania. We will grant California Portaphone leave to file its Supplemental Comments and are addressing its contentions accordingly.

[10] Cellular Lottery Decision, at para. 29.

[11] *Id.,* at para. 28.

[12] We note that comparative evaluation would not necessarily benefit the petitioner. Its claim to have filed a "comparatively superior" application for Fresno is purely speculative since direct cases have not been filed.

purpose of the Lottery Statute[13] and would result in the kind of hybrid lottery/comparative approach that we have already rejected.[14] Accordingly, we will deny Portaphone's petition to the extent it requests the reconsideration of comparative selection for the Fresno and Northeastern Pennsylvania markets.

10. Similarly, Portaphone's request for reconsideration of our policy awarding cumulative choices in markets 31-90 to applicants entering into partial settlements is intended only to forestall the settlement process and improve its bargaining posture. The petitioner's assertion that this policy disadvantages single-market applicants again raises no legally cognizable issue and, in any case, is outweighed by the obvious and essential role of cumulative chances in promoting settlements and expediting the provision of service to the public in these markets.[15] Our long-standing policy of favoring settlements among mutually exclusive cellular applicants has served the public well and we will also deny Portaphone' petition in this regard.[16]

C. Application Standards and Cumulative Chances

11. *Cumulative Chances and Settlements.* Maxcell Telecom Plus, Inc. requests that the Commission reexamine several issues concerning the filing procedures and standards for cellular applications in markets beyond the top-90. Maxcell contends that the Commission's approval of the use of pre-filing settlement agreements and mass-marketed, non-exclusive applications creates great incentives for a "lead" applicant to increase its chances in a lottery by orchestrating efforts to persuade as many other persons as possible to file minimally acceptable applications solely to "stuff the ballot box" and obtain a cumulative chance in the lottery. It points to the more than 5,000 applications filed for markets 91-

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[13] The Communications Amendments Act of 1982, Pub. L. 97-259, Section 115, 96 Stat. 1087, 1094-95, enacted September 13, 1982, amending Section 309(i) of the Communications Act of 1934, as amended, 47 U.S.C. 309(i).

[14] Cellular Lottery Decision, supra. at para. 28. In addition, Portaphone's contention that a comparative proceeding would be faster than holding a lottery because of the likelihood of administrative and judicial review of the lottery selection, ignores the fact that Commission reconsideration and/or judicial review has been sought of nearly all selections made by comparative consideration in the top-30 cellular markets.

[15] A number of commenters have stated that the full-market settlements achieved in markets 31-90 would not have been possible without, and in fact are conditioned upon, the awarding of cumulative chances.

[16] We reject Portaphone's contention that cumulative chances represent an impermissible lottery preference. On the contrary, the cumulative chances merely preserve the existing chances of individual applicants who would otherwise be penalized for entering into partial settlements. Thus, cumulative chances are not "preferences" similar to those awarded in mass media lotteries but rather are a means of maintaining each applicant's odds through the settlement process.

120 as evidence and notes that many of the applications appear to be mass produced and to have been filed with no intention of ever operating a cellular system. Maxcell concludes that this "flood of petitions", in addition to straining our processing resources, makes it unlikely that a "serious" applicant with a *bona fide* desire to provide cellular service will ultimately obtain the license. Accordingly, Maxcell would prohibit the filing of applications by persons who have entered into pre-filing settlement agreements.[17] It would prohibit the filing of mass-produced, mass-marketed "cookie cutter" applications and would also prohibit any individual engineer or engineering firm from selling the same cellular design to more than one applicant for the same frequency block in a market. Finally, Maxcell would further strengthen the basic qualifying standards to require 39dBu coverage of either 85% of the population or land area of the MSA, coverage of 85% of all interstate highways within the MSA and a 0.02 design grade of service standard.[18]

12. In its comments, Bluegrass Broadcasting Co., Inc. raises the same general concerns as Maxcell. Bluegrass seeks reconsideration of the use of lotteries in markets 91-120 or, in the alternative, that a comparative proceeding be held for the Lexington-Fayette, Kentucky market in which it is an applicant. The essence of Bluegrass' contention is, that as a local communications enterprise, it could reasonably have anticipated success in a comparative proceeding involving a small number of applicants. It has reviewed the 129 applications filed for Lexington, however, and finds its chances of obtaining the license greatly diminished by the many mass-marketed applications filed—applications it assumes have been filed by speculative parties who have not proposed the best system for and are not committed to providing high-quality service in Lexington. In other words, Bluegrass asserts that allowing pre-filing settlement agreements and non-exclusive applications has multiplied the number of speculative applications to the detriment of the serious, locally-based radio common carrier.

13. The parties filing comments in response to Maxcell generally supported our existing policies on these matters. For example, Interstate

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[17] Maxcell contends that pre-filing settlements violate Section 22.21 of the Rules, which prohibits the filing of inconsistent or conflicting applications by the same applicant, as well as Section 22.921 which precludes an applicant from having a one percent or greater interest in a mutually exclusive application. We agree that there have been some abuses of the Commission's limited approval of pre-filing settlements. Accordingly, we are offering applicants who have reached an agreement with a "lead" applicant prior to filing, whereby their applications will be dismissed in exchange for a miniscule portion of the lead applicant leaving the original lead applicant with a majority of the settled entity, an opportunity to withdraw from such filing arrangements. See note 22, infra.

[18] These are essentially the same standards that Maxcell advocated in its original and reply comments in this proceeding.

Cellular Network criticizes Maxcell's position as providing no compelling reason why a different public interest analysis pertains when a settlement is reached prior to instead of after filing. It states that the Commission should encourage *bona fide* parties to enter into joint ventures at any stage of the licensing process and that any attempt to prohibit pre-filing settlements would encourage secret agreements among applicants and resultant potential abuse of our processes. Similarly, Pactel Mobile Access states that pre-filing settlements are in the public interest as they encourage settlement of mutually exclusive applications by reasonable persons, rather than by "mindless" chance.

14. In the *Cellular Lottery Decision*, we affirmed our tentative conclusion to allow settling parties a cumulative lottery chance to reflect partial settlements.[19] This decision was intended to foster settlements among applicants in markets 31-90, thereby reducing the number of parties in the lottery (and thereby the number of petitions filed against the tentative selectee) or possibly resulting in full-market settlements. Our decision to allow cumulative chances for partially settling applicants has been an essential factor in inducing applicants in markets 31-90 to enter into partial settlements—which have ultimately become full-market settlements in all but three markets. This has substantially shortened the time it would otherwise have taken—by lottery or comparative hearing—to license competitive cellular service in these markets. Even in the three non-settling markets, partial settlements have eliminated all but two mutually exclusive applications, thereby enabling us to complete the licensing process expeditiously. Thus, the benefits we anticipated in allowing cumulative chances in markets 31-90, i.e., fostering settlements to reduce the number of competing parties and simplify the licensing process, have been realized and our policies have expedited the licensing of competitive cellular systems.

15. On the other hand, however, the picture in the beyond-90 markets is not so clear. We decided to allow cumulative chances in these markets to accommodate the fact that some entities, particularly wireline carriers, claimed to have already tentatively entered into pre-filing joint ventures in accordance with our long-standing policies favoring settlements and in contemplation of comparative advantage in a hearing, and wanted cumulative chances in a lottery. In adopting this policy for markets beyond the top 90, we recognized that allowing pre-filing settlements, along with non-exclusive applications, could encourage large groups of filings intended solely to obtain a better chance of lottery selection. Accordingly, we cautioned applicants that mere "lottery tickets" would not be accepted for filing, i.e. that each applicant must demonstrate its

[19] Cellular Lottery Decision, *supra*, para. 48.

independent technical and financial qualifications.[20] By Public Notice, the Common Carrier Bureau provided further guidance on this matter informing applicants that each party to a pre-filing settlement must itself be the real party in interest behind its application, i.e., must bear the costs of and be capable of prosecuting its individual application which must be independently complete and acceptable for filing under the Rules.[21] Notwithstanding these safeguards, however, in markets 91-120, the first markets for which applications were filed in contemplation of lottery selection, the prospect of obtaining cumulative chances has become an incentive for promoters to create abusive filing schemes involving large numbers of speculative, insincere and unacceptable applications. Accordingly, we must consider whether the prospective benefits of allowing cumulative chance in these beyond-90 markets, in terms of promoting settlements and simplifying the licensing process, are sufficient to overcome the application process abuses that are occurring.

16. Our experience with applications filed in a lottery selection regime indicates that making a cellular license available virtually for free engenders a variety of schemes intended to increase the chances of an applicant or group of applicants obtaining it. The more than 5,000 applications filed for markets 91-120—a staggering increase over the previous rounds even though the new markets are less populous—illustrates this fact. Many non-exclusive, virtually indistinguishable applications have been filed by investors and speculators under pre-filing agreements to enable a selected "lead" applicant to collect their cumulative lottery chances and thus enhance its selection odds. This has made it necessary for our staff to conduct an extremely thorough and in-depth pre-screening of these applications—at a considerable cost in staff time and resources—as well as delay in the conduct of lottery selection.[22] While we remain confident that the staff's review, coupled with a rigorous review of tentative selectees, will assure that each licensee in markets 91-120 is selected fairly and is fully qualified financially and technically to provide cellular service, we conclude that the public interest would be

[20] Id., para. 71.

[21] Public Notice, "Cellular Application Filing Policies", Report No. CL-75, June 6, 1984.

[22] We have instructed the staff to return cellular applications for markets 91-120 which have been determined to be defective under Section 22.20 of the Rules. We have also instructed the staff to identify cellular applicants who appear to be part of an orchestrated effort to "skew" the odds of winning the lottery in a given market. Such applicants will be allowed to voluntarily dismiss their applications, amend them to withdraw from any pre-filing agreement or maintain their applications as originally filed. See Public Notice, "Common Carrier Bureau to Return Defective Cellular Applications and Permit Withdrawal from Pre-Filing Settlement Agreements in Markets 91-120", Report No. CL-291, April 10, 1985.

better served by modifying our cellular application filing standards for future rounds to prevent application speculation and abusive filings.

17. Maxcell would address the problems discussed above by prohibiting pre-filing settlement agreements. It argues that, in contrast to the demonstrated value of post-filing settlements, pre-filing settlements serve no purpose but to encourage inherently "sham" applications to create a cumulative chance. We conclude, however, that eliminating the cumulative chance policy for future filings would have a greater deterrent effect. Merely prohibiting pre-filing agreements of all kinds would leave speculative applicants the opportunity and incentive to file non-exclusive—but acceptable—applications and subsequently settle for a cumulative chance.[23] Thus, prohibiting applicants from entering into pre-filing settlement agreements would not significantly reduce the problem of abusive applications.

18. Prohibiting the filing of non-exclusive applications could significantly reduce the large number of low-cost applications filed. However, we have been presented with no objective evidence that such applications are inferior, or that an applicant using such an application would not provide high-quality service. Maxcell states that a non-exclusive application is necessarily of lesser quality than a "carefully scrutinized application, prepared under the watchful supervision of its principals."[24] There is no inherent reason why this must be so. A non-exclusive application simply spreads its cost over a greater number of applicants. If conscientiously prepared, it should contain engineering for a well-developed, market-specific cellular system. Indeed, by spreading the cost of preparing a high-quality application over a number of principals, a dedicated engineering and consulting team may well be able to prepare a better application than one applicant alone could pay for. In addition, by lowering the cost of obtaining an acceptable application, this policy has opened up the cellular service to new entrants and to increased competition. Moreover, the problem we face here is not that of non-exclusive applications *per se*, but rather, their use by speculators and other insincere parties in an attempt to "stack the odds" in their favor.

19. Given these considerations, we will not grant settling nonwireline applicants in markets beyond the top-120 a cumulative chance to reflect partial settlements. Our decision to allow partially settling parties a cumulative chance—even under lottery selection—was based in large part on the public benefits of inducing settlements in markets 31-90. While we also sought to preserve this settlement incentive for the beyond-90 filings,

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[23] We also anticipate that some speculative applicants would enter into undisclosed pre-filing agreements. Discovering the existence of these agreements and addressing them would be a potent source of delay.

[24] Maxcell's Petition for Reconsideration, Request for Clarification and Deferral, at page 7.

the number of applications filed in markets 91-120 indicates that this expectation is unrealistic. For example, while most 31-90 markets had no more than 20 mutually exclusive applicants for one frequency block, in markets 91-120 there are more than 100—and in some markets 200—mutually exclusive applications in each market for the non-wireline frequency block. Given the reduced cost of applying under lottery procedures, and the relative simplicity of the application process, it is likely that there would be comparable numbers of applications in future filing rounds if our policy were maintained. Even recognizing that some applications will be returned as unacceptable for filing (and that some applications in markets 91-120 are part of pre-filing settlements) it is likely that there will still be too many mutually exclusive nonwireline applications in each market for useful settlements to be practicable to achieve. Moreover, even if a significant number of large partial settlements could be concluded, the existence of a large number of applicants makes full settlements unlikely. Even as to major partial settlements, the time required to reach them, based on the time it took for settlements in markets 31-90 to be accomplished, would be better used in holding lotteries for these markets and processing the tentative selectee's application.[25]

20. In short, under a lottery selection regime, we anticipate that nonwireline applicants will not realistically be able to effectuate full settlements that will serve the public interest by simplifying and/or expediting the licensing process. Rather, the settlement process is likely to lead to lengthy delays, as the applicants attempt to negotiate terms for realistically workable partnerships. Under these circumstances, the value of offering a cumulative chance to induce settlements is greatly reduced. We conclude that whatever value cumulative chances may retain for promoting useful settlements in future rounds is far outweighed by the cost, delay and inefficiency that results from the likely filing by speculators of multiple applications solely to create better selection odds. Our objective in adopting lottery selection procedures was to deliver competitive cellular service to the public more quickly than would have been otherwise possible. The application filing modifications we are announcing today will safeguard this important goal by helping to preclude abusive and speculative practices that delay and complicate the licensing process without providing an offsetting public benefit.[26]

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[25] Many months were required to achieve the initial "Grand Alliance" and "Cellular System One" settlements. The final full-market settlements, involving dozens of applicants, took nearly half a year to effectuate.

[26] Not allowing cumulative chances for the beyond-120 nonwireline markets will help prevent the abusive practices discussed above, while still encouraging legitimate new entrants to apply given the reduced entry barriers inherent in a lottery selection system. In addition, we will subject to strict scrutiny any applications which appear to contain

21. We will continue to allow settling wireline applicants in markets beyond the top-120 a cumulative chance to reflect any partial settlement. The local service area presence required of any initial applicant for the wireline block limits the number of possible mutually exclusive wireline applicants in each market to a relatively small group that, in turn, limits the potential for speculation and means that partial and even full market settlements remain realistic.[27] For example, in markets 91-120, only one market has as many as ten applicants and approximately three quarters of the markets have fewer than five applicants. Moreover, the problem of abusive application schemes intended to create a cumulative chance for a lead applicant is precluded by these requirements. Therefore, we conclude that the public interest will be served by the continuation of cumulative lottery chances for wireline applicants in the beyond-120 markets.

22. Finally we note that non-wireline applicants may still enter into settlement agreements, either before or after filing, although they will receive no cumulative chances.[28] Thus, an applicant could agree to sell a minority interest in its application to other applicants if it is in fact selected, or agree to buy a minority interest in another application if that one is selected.[29] In this way, applicants may still exercise their business judgment to effectuate sensible joint ventures or partnerships without the application abuses experienced in markets 91-120.

23. *Basic Qualifying Standards.* As noted above, Maxcell also requests that the Commission strengthen the basic qualifications for applications in markets below the top-90. It asserts than an 85% 39 dBu coverage requirement of either MSA population or geographic area and 85% coverage of all interstate highways within the MSA, as well as a grade of service standard, is necessary to insure licensing of a high quality proposal.[30] In essence, Maxcell repeats its comments made earlier in this proceeding that basic qualifying standards should be set high enough to require an applicant to propose service equivalent to that proposed by applicants in the top 30 markets.

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management agreements with other cellular applicants or otherwise appear to create multiple opportunities for an individual or organization to own, control or manage the cellular licensee in a particular market.

[27] This is evidenced by the fact that full-market wireline settlements have made it unnecessary to designate for hearing or hold a lottery for the selection of a wireline licensee in any of the top-90 markets.

[28] In view of this policy, any post-filing settlement must be disclosed to the Commission and the non-surviving applications must be dismissed prior to lottery.

[29] To avoid evasion of the no-cumulative chance policy, we will not permit an applicant to agree to transfer effective control of its application to another applicant who has not dismissed, or to enter an agreement to sell to a person not involved as an applicant.

[30] Presently we require that an applicant propose coverage of 75% of the population or 75% of the area of the MSA within its CGSA and that its 39 dBu contours include 75% of the CGSA. We did not adopt a highway coverage or grade of service standard.

24. In the *Cellular Lottery Decision*, we sought to strike a balance between the need to prevent inferior applications and the desirability of allowing cellular applicants maximum flexibility to design creative, market-based solutions for varying cellular market characteristics.[31] We placed high regard on allowing cellular applicants to design their systems in response to marketplace forces and on avoiding standards that would restrict that flexibility, be difficult to administer or unlikely to effectively deter frivolous applications. Maxcell characterizes this balancing of interests as an "abdication" of our responsibility to ensure adequate coverage and quality service proposals. We disagree. First, the standards we have adopted adequately achieve the goal of assuring that diverse applications propose generally comparable levels of system coverage and capacity. Second, raising area or population coverage levels as Maxcell suggests, will not guarantee a significantly superior system. Indeed, in some markets it may result in a system that is too high in quality to be supportable economically. Third, establishing a coverage standard for interstate highways appears unnecessary since cellular operators will obviously provide service to area highways with significant demand for cellular service. Such a standard could have the unintended effect of requiring coverage of sparsely traveled or peripheral roads while allowing an applicant to ignore more important highly travelled non-interstate traffic arteries. Standards such as these might result in uneconomic and unwarranted coverage, particularly in smaller markets. We continue to believe that the public will be better served by allowing applicants maximum flexibility to design systems in response to market-specific indicia of cellular demand and that our purpose should be to require only generally comparable minimum levels of area or population coverage. Maxcell has not demonstrated that stricter coverage or grade of service standards would ensure a higher quality of service or deter allegedly inferior applications; consequently, we will deny its request for reconsideration of this matter.

25. As we stated in the *Cellular Lottery Decision*, the basic qualifying requirements already in place for cellular applicants include a showing of financial ability to construct the system and to operate it for one year (Section 22.917) and a variety of technical qualifications (Section 22.913). With regard to financial ability, the prevailing standard, which we applied rigorously in top-30 markets, is one of "reasonable assurance" that the funds needed to construct the proposed system and operate it for one year would be available. *Advanced Mobile Phone Service, Inc.*, 91 FCC 2d 512, 516-17 (1982). However, in markets 31-90, where the cost of construction was considerably lower (in the $4-$5 million range) and the settlement partnerships have access to additional sources of financing, our staff has

[31] Cellular Lottery Decision, supra, paras. 67-69.

applied the requirement somewhat less rigorously. The staff has accepted letters from banks or other investment funding sources indicating a general willingness of that institution to provide the funding required by the applicant. Such statements often contain only very general terms and may technically fall short of the "reasonable assurance" required by our rules. Nevertheless, the bank statements appear consistent with banks' general commercial lending practices taking into consideration the amount of money and the risk involved.

26. In adopting lotteries for cellular licenses, we contemplated that Section 22.917 would be an effective barrier to frivolous applications and that a more stringent basic financial requirement would not be needed. However, our experience with applications filed for markets 91-120 in contemplation of lottery selection indicates that this is not the case and that a stricter interpretation of Section 22.917 is warranted. In a lottery selection regime, the low cost and relative simplicity of the application process has encouraged many purely speculative applications by thinly or non-capitalized entities seeking to "win" the lottery having no interest in providing cellular service but seeking to profit from obtaining the license. While our policies are intended to encourage legitimate new entrants, these types of applications, in concert with abusive application schemes to create a cumulative chance, disserve the public interest. Thus, while under comparative procedures the "reasonable assurance" test was adequate—since any material question of fact could be designated for hearing—in a lottery context this standard is insufficient to deter speculative, insincere applicants from abusing the lottery process and causing excessive cost and delay in its administration. Therefore, we conclude that in a lottery selection regime, a stricter financial demonstration requirement for cellular applicants will more efficiently and effectively assure that lottery entrants are *bona fide* applicants possessing a demonstrated ability to construct and operate a high quality, competitive cellular system.

27. Accordingly, in future application rounds we will interpret Section 22.917(e) to require applicants who intend to finance their systems through debt placement to submit a firm lending commitment from a recognized bank or other financial institution for the financing required. Such commitment must guarantee availability of the amount of financing necessary to construct and operate for one year the system at issue, and set forth the terms of the loan commitment, including any action required of the applicant to continue the commitment in force.[32] An applicant

[32] We recognize that under this policy applicants may have to pay the lending institutions to provide a firm financing commitment for the specific system proposed for the market applied for. The applicant must submit an original, signed loan commitment document in its original application; i.e., no photocopy letters or "Dear Applicant" letters will be accepted.

intending to rely on internal funding must submit the information required by Section 22.917(c), in conformance with generally accepted accounting principles, to demonstrate its financial ability. If an applicant obtains a funding commitment from other than a recognized lending institution or internal sources, it must submit proof that the financing entity has such funds available and uncommitted to other cellular applications, or, in the alternative, has obtained a bond to guarantee performance of its obligation. We conclude that requiring an applicant to demonstrate in this way its ability to construct and initially operate its proposed system will further deter frivolous and purely speculative applications, thereby helping to assure that only qualified applicants are ultimately granted a license. Notwithstanding the above, we conclude that it would be unfair to retroactively apply this more stringent policy in markets 91-120 since applicants did not have prior notice of it. Therefore, we will apply the "reasonable assurance" standard assiduously in these markets. Accordingly, we are carefully scrutinizing the applications filed for markets 91-120 at the prescreening stage to identify those with obviously deficient financial showings.[33] In addition, we will carefully review the tentative selectee's application to ensure compliance with this standard.

28. *Coverage Demonstration.* Although we have not found it necessary to modify the basic coverage requirements established in *Cellular Lottery Decision*, we will take this opportunity to emphasize that Section 22.903 of the Rules does not permit an applicant merely to certify in its application that its proposed Cellular Geographic Service Area (CGSA) includes at least 75 percent of either the land area or population of the MSA or NECMA the applicant is applying for. For the Commission to find that an applicant's CGSA meets this standard, the applicant must supply sufficient information regarding the extent of its CGSA. This must be done by indicating the total land area or total population of the MSA or NECMA, and the total land area or population included within the proposed CGSA, expressed both absolutely and as a percentage of the total MSA or NECMA. Including this detail will enable the staff to determine whether this basic coverage requirement is being satisfied.[34]

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[33] For example, in some markets financial institutions issued letters expressing a willingness to consider lending millions of dollars that were styled, "Dear applicant," with a label affixed indicating the name of the applicant. Other letters contained no terms of the proposed loan agreement.

[34] By Public Notice, Report No. CL-69, the Bureau set forth a calculation methodology by which the 75 percent CGSA coverage requirement would be deemed satisfied. Any alternative method which is more precise than that described, *e.g.*, census tracts, is also acceptable. What we are requiring here is that applicants provide sufficient information to demonstrate that this requirement has been met. A mere statement that the CGSA

D. Application Filing Procedures

29. *Fill-in Applications.* A number of independent telephone companies, as well as Maxcell, seek reconsideration of our policy regarding the filing of applications for areas within an MSA or NECMA not included within a permittee's or licensee's CGSA.[35] In the *Cellular Lottery Decision*, we decided to accept applications in 30 market groups, with applications due on a date-certain, for MSAs and NECMAs beyond the top-90. Subsequently we will accept applications for non-MSA/non-NECMA areas on a date-certain and, finally, will accept applications for any remaining areas under regular notice and cut-off filing procedures.[36] We also addressed the question of whether applications may be filed for any part of an MSA or NECMA not included in the existing authorization of the cellular permittee or licensee. We stated that applications for a market or any part of a market are due on the specified date and that subsequent applications would be rejected.[37] However, we provided that a cellular permittee or licensee may apply at any time to increase its CGSA within the boundaries of the relevant MSA or NECMA and that competing applications would not be accepted during the initial nationwide cellular licensing period. This approach recognized that such modifications are natural extensions of an existing permittee or licensee's cellular authorization in response to growing or changing demand and should be subject to minimal regulatory oversight during the initial licensing period.

30. Three of the petitioners on this issue claim that existing Commission policies provided a delayed filing right for telephone companies serving rural portions of MSAs to file fill-in applications for parts of the MSA not included in the permittee's or licensee's CGSA.[38] They propose that we modify the policy set forth in the *Cellular Lottery Decision* to permit such applications without restriction in the top-90 MSAs. The other two petitioners assert that prohibiting fill-in applications by prospective applicants in the top-30 markets, while permitting such applications by

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covers 75 percent of the MSA or NECMA total population or land area is inadequate and will in the future result in the application being unacceptable for filing under the Rules.

[35] Petition for Partial Reconsideration of Baldwin Telecom, Inc. and St. Croix Telephone Company; Petition for Reconsideration of Hamel-St. Jacob Cellular Telephone Company, Lake Bridge Cellular Telephone Company and LaStar Cellular Telephone Company; Petition for Partial Reconsideration of Roggin Telephone Cooperative Co., Wiggins Telephone Association, Strasburg Telephone Co., and Eastern Slope Rural Telephone Association, Inc. In addition, on January 9, 1985, Northwestern Indiana Telephone Company filed a Motion for Leave to File a Supplement to Hamel-St. Jacobs Petition for Reconsideration. We will grant the Motion.

[36] Cellular Lottery Decision, supra, para. 55.

[37] Cellular Lottery Decision, supra, n. 82 at para. 54.

[38] Petitioners asserting this argument are Baldwin Telecom, Inc., St. Croix Telephone Company, and Roggin Telephone Cooperative Co., *et al.*

existing licensees, is not provided for in the Rules and is outside the scope of this proceeding, and that we should issue an NPRM properly raising the issue.[39] The opposition commenters[40] contend that the fill-in policy announced in footnote 82 is merely a continuation of existing policy; that notice and comment rulemaking is not required; and that the existing policy serves the public interest.[41]

31. Our intention in footnote 82 of the *Cellular Lottery Decision* was to clarify our existing fill-in-policy for all markets.[42] We have taken the position that dates certain are established for filing initial cellular applications. In footnote 82 we indicated, however, that after all initial filing periods have passed, i.e., the completion of the initial nationwide cellular licensing process, applications for new systems may be filed by any applicant for unapplied-for areas. Thus, in footnote 82, we stated that applicants such as these petitioners would have an opportunity to file at some later date for unapplied-for portions of markets for which the filing deadline had passed that otherwise could not be applied for until renewal time. Accordingly, their petitions are denied.

32. We will take this opportunity to affirm our policy regarding fill-in applications.[43] Applicants have had ample notice that applications for any portion of an MSA must be filed on the specified filing date or be barred throughout the initial nationwide licensing period. This policy serves the public interest by allowing the initial licensee flexibility to expand within the subject MSA or NECMA in response to growing or changing demand in the marketplace. In addition, it promotes the expeditious, orderly processing of cellular applications and prevents the "regulatory paralysis" that could ensue if these areas were open to unrestricted applications at the same time that we are attempting to complete the nationwide licensing of cellular service. We do not agree with those commenters who suggest that barring fill-in applications by non-permittees and non-

[39] Petitions of Hamel-St. Jacob, *et al.*, and Maxcell.

[40] Bell Atlantic Mobile Systems, Inc., BellSouth Mobility, Inc., Centel Corporation and Pactel Mobile Access filed separate comments opposing reconsideration of the fill-in policy as provided in n. 82 of the Cellular Lottery Decision.

[41] Bell Atlantic suggests that in fact the policy announced in n. 82 has expanded the opportunities for non-licensees to file for uncovered MSA/NECMA areas. It suggests that previously non-licensees could not file any fill-in application after the date-certain filing period for a market hard passed whereas now, they may file without restriction during the final open-ended application period.

[42] The policy enunciated in n. 82 is consistent with the Common Carrier Bureau's treatment of fill-in applications by non-permittee/licensees for top-30 markets. *See, e.g.* letter re: Maxcell Telecom Plus, Inc. File Nos. 27040-CL-L-84; 27041-CL-L-84 (April 27, 1984). The Bureau further articulated this policy in New Orleans CGSA, Inc., Mimeo 6904, released October 1, 1984, *app. for review pending.*

[43] By fill-in applications we mean applications for new cellular systems for unapplied for portions of MSAs for which filing dates have passed.

licensees will deny service to persons in the uncovered area. First, the existing license will promptly expand its CGSA if there is sufficient demand to warrant service. Second, competing applicants can again apply for the areas at the end of the initial nationwide licensing period. Thus, we conclude that any delay in providing service to these areas will be temporary and is outweighed by the overriding public benefit of enabling us to continue the orderly filing and processing of applications for markets that do not have any service.

33. *Alternative Application Procedures.* New Vector has requested that we modify the cellular application filing procedures to accept applications on a state-by-state basis. This would have the advantage, New Vector asserts, of enabling the expeditious licensing of regional areas which might otherwise not be in line for complete licensing for a period of years.

34. In adopting an application acceptance schedule incorporating filing by MSA or NECMA in order of decreasing population, we recognized that there might be areas where carriers are anxious to implement service but for which applications would not be accepted immediately.[44] Here, New Vector would like to obtain authorization for most of the significant markets around major metropolitan areas within its service area in order to develop regional, integrated systems. We recognize this concern; however the application filing schedule already adopted is likely to provide service to more of the national population faster than a state-by-state approach. More importantly, we conclude that the disruptive effect of so major a change in the application process at this late stage would result in unwarranted confusion and delay without countervailing public benefit. We cannot make provision for every possible situation and still maintain an orderly, expeditious processing system for the vast majority of the country.[45] Thus, we affirm our phased, market-based acceptance schedule.

E. Non-MSA/Non-NECMA Areas

35. Coastal Utilities, Inc. and New Vector Communications, Inc. request that we make an exception to the 2,000 square mile limit established on the size of an applicant's proposed CGSA in non-MSA/non-NECMA areas. They state that the 2,000 square mile rule will allow an insufficiently large CGSA to cover interstate or other major inter-MSA/NECMA highways in many parts of the nation.[46] The petitioners point out

[44] Cellular Lottery Decision, supra, para. 55.

[45] Id.

[46] Coastal estimates that a system designed to serve an interstate highway would, due to the service radius of each site, be capable of covering only about 110 miles of highway before exceeding the overall 2,000 square mile limit. *See* Coastal petition at p. 2.

that an inter-MSA/NECMA system that cannot "connect" with the cellular systems at either end would be uneconomic and would thus inhibit the development of cellular service along such highways. Pactel Mobile Access supports the petitioner's request suggesting that we review the need for the 2,000 mile rule when a proposed system would cover a four-lane interstate highway between two MSA/NECMAs or cities of at least 50,000 persons.[47]

36. In considering whether to establish boundaries on the overall size of an applicant's CGSA in non-metropolitan areas,[48] we concluded that maximum system design flexibility would best serve the public interest by freeing applicants to identify local demand, market growth potential and marketing receptivity and design their systems accordingly.[49] We also concluded that some maximum limit on CGSA size is necessary in order to simplify our determination of mutual exclusivity, discourage abusive filings and reduce disparities in CGSA size. The petitions on this issue suggest that we have for the most part reached a proper balance of the need for administrative efficiency and the crucial need for maximum system design flexibility in these less densely populated areas. However, the petitions do point out one situation in which the CGSA limitation could unnecessarily restrict an applicant's ability to design its system to accommodate cellular demand, thereby hindering the design of a viable system. At the same time, we cannot totally discount the possibility that creating the requested exception could have certain disadvantages, e.g., it could increase the incidence of mutually exclusive applications, complicate the achievement of settlements among mutually exclusive applicants particularly on the wireline side and, render essentially meaningless the exchange presence requirement for wireline carriers.[50] Given all of these factors, we conclude that the 2,000 square mile limitation must be maintained. An applicant wishing to serve a greater non-MSA area must file separate applications, covering no more than 2,000 square miles each.[51]

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[47] The United States Telephone Association comments that in considering this issue we should act so as to maximize system design flexibility. In addition, it asks that we allow non-MSA/non-NECMA applicants to amend their applications as a matter of right to eliminate mutual exclusivity by reducing their CGSAs or dividing the proposed system into smaller distinct systems and applications. We believe that we have already provided such applicants an opportunity to resolve frequency conflicts to achieve these goals. *See* Cellular Lottery Decision, *supra*, at para. 61; Section 22.918(c)(1) of the Rules.

[48] Boundaries considered included entire state, Basic Trading Areas, and single and multi-county areas.

[49] Cellular Lottery Decision, *supra*, paras. 59-60.

[50] *See*, opposition comments filed by Centel Corporation to the petitions of Coastal and New Vector.

[51] Applicants may, however, indicate in the separate applications that if granted the systems would be constructed and operated as an integrated whole.

F. The 1% Rule

37. Four petitioners request reconsideration of Section 22.921 of the Rules which prohibits any party in markets beyond the top-90 from holding an ownership interest of 1% or more in more than one cellular application per MSA market, or from holding ownership interests of 1 percent or more in mutually exclusive cellular applications for a non-MSA/non-NECMA area.[52] In general, the petitioners contend that a 1% ownership attribution standard is an unnecessarily strict level for imputing the possibility of control and that there are alternative attribution benchmarks, below 50 percent ownership, that will effectively prevent abuse of the cellular lottery process while ensuring that cellular applicants have reasonable access to financing sources. Specifically, the petitioners assert that the 1% rule poses virtually insurmountable burdens on publicly owned corporations to identify shareholders with a cognizable interest and thus substantially impairs their ability to apply in markets beyond the top 90.[53] They further state that such a strict standard identifies many shareholders with inconsequential ownership interests in terms of their possibility of exercising control and ability to manipulate the lottery process and is likely to generate disputes regarding the accuracy and reporting of interests in multiple cellular applications causing administrative complexity and delay. The petitioners state that while the risk of a 1% shareholder in a publicly held corporation manipulating the lottery process is virtually nonexistent, the goal of achieving nationwide cellular service could be substantially impaired by precluding those corporations with the greatest resources and capital raising potential from participating in cellular ventures due to an unreasonably low attribution standard.[54] They also assert that the

[52] Petition for Partial Reconsideration of American Financial Corporation; Petition for Reconsideration of Cellular Communications, Inc.; Petition for Reconsideration of Western Union Personal Communications, Inc. and Associated Communications Corporation.

[53] For example, Western Union and Associated state that the 1% rule requires a publicly held corporation to ascertain the identity of all its shareholders with a cognizable interest. Many such corporations have thousands of constantly changing shareholders and, in many instances, the shares are held in "street names" by brokerage houses and investment banks reluctant to disclose the beneficial owners. Moreover, even if its shareholders can be identified, it may be impossible for the corporation to ascertain whether those shareholders also hold interests in prospective mutually exclusive applications. In addition, many shareholders with a greater than 1% interest are passive investors, such as mutual funds and bank trust departments, which are likely to have a cognizable interest in other corporations applying for cellular licenses. Although such passive investors usually do not exercise a managerial or control interest in the corporations in which they hold stock, the 1% rule could have the effect of precluding the publicly-held corporation from applying in a particular market.

[54] Petition of Western Union and Associated, page 7.

considerations that led to the adoption of the 1% rule in the Low Power Television Service (LPTV) do not apply with equal force for cellular;[55] that the Commission has recognized that a 1% ownership standard can be a substantial obstacle to securing investment;[56] and that this is a more significant problem in the capital-intensive cellular industry than the relatively low-cost LPTV service.

38. The petitioners support a variety of alternative ascertainment guidelines. For example, Western Union and Associated urge a 5% attribution standard, similar to that established in the *Multiple Ownership Decision* for the broadcast and cable services, with a 10% benchmark for passive investors.[57] American Financial Corporation would have us not disqualify a party with a controlling interest in a cellular application by virtue of its non-controlling minority interest in a mutually exclusive applicant, provided that the aggregate of all its interests in a single market do not exceed 100% of a single application. In the alternative, it also supports a 5% attribution standard.[58] The United States Telephone Association urges that a 10% ascertainment benchmark is appropriate, arguing that shareholders with lesser interests can only rarely influence corporate decision-making and that 10% represents a reasonable correlation between ownership and control. Cellular Communications, Inc., (CCI), supports a separate rule for closely-held corporations, which it would define as those with 50 or fewer stockholders whose shares are not traded publicly, under which voting interests of less than 33% would be ignored. In addition, the various petitioners and commenters propose a number of additional guidelines regarding non-voting stock and other non-voting interests, provisions for rebutting the selected benchmark in appropriate circumstances to allow a higher level of ownership and the use of a multiplier for determining attribution in vertical ownership chains.[59]

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[55] For example, Western Union states that the 1% rule in LPTV was intended to prevent "stuffing the ballot box" such that the Congressional preference for diversity of ownership and minority group status would be nullified. Western Union states that these considerations are not present in the cellular service.

[56] In the matter of Corporate Ownership Reporting and Disclosure by Broadcast Licensees (Multiple Ownership Decision), FCC 84-115, released April 30, 1984.

[57] Western Union and Associated support adopting virtually all of the rules set forth in the Multiple Ownership Decision, particularly the multiplier for determining attribution in vertical ownership chains, an opportunity to rebut the 5% benchmark in appropriate cases, and the standard under which non-voting stock is non-cognizable as well as certain other classifications.

[58] Cellnet Partners and MCI also commented in favor of the Western Union/Associated proposal.

[59] National Cellular Communications Limited Partnership was the only commenter supporting continuation of the 1 percent rule and opposing reconsideration. It contends that no party has demonstrated how a modification would serve the public interest. We disagree to the limited extent discussed below.

39. In the *Cellular Lottery Decision*, we stated that the issue of minority ownership shares in more than one application in a market is difficult to resolve in a totally satisfactory manner because there is no single point below 50 percent ownership at which a presumption of control clearly arises.[60] For example, in a closely-held corporation, anything less than 50 percent ownership typically deprives that owner of effective control, whereas, in a widely-held public company, as little as 10 percent ownership may vest control. Accordingly, we attempted to balance our desire to give applicants wide latitude in forming business relationships against the need to promote consistency and simplicity in the administration of the cellular lottery, i.e., to avoid making case-by-case ownership determinations. Thus, we adopted with slight modification the standard used in the Low Power Television Service and decided to bar mutually exclusive applications in which any party common to both applications is an officer, or director, or has any interest, direct or indirect, except that interests of less than 1% will not be considered. Our decision to adopt the 1% rule was intended to promote administrative efficiency and fairness in the lottery process given the absence of any evidence that allowing the ownership of a minority share in multiple applications would advance the public interest. In general, we continue to believe that this approach best promotes the public interest by minimizing the likelihood that any applicant may have a substantial or controlling interest in more than one application for a cellular license. However, our experience with the application process for the fourth round markets and the evidence presented by the petitioners supports a limited modification of the one percent rule to reduce the burden it places on widely-held, publicly-traded corporate applicants, as discussed below. Except for this limited modification, however, we will retain the one percent rule for governing all other ownership interests in mutually exclusive applications in a market as well as ownership interests in applications for both frequency blocks in a market.[61]

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[60] Cellular Lottery Decision, supra, para. 78.

[61] Section 22.921 prohibits interests of 1 percent or more in more than one application for a market, and interests of 1 percent or more in mutually exclusive applications for non-MSA/non-NECMA areas. The petitions before us do not request reconsideration of the 1 percent rule with regard to "cross-over" wireline/non-wireline ownership interests for the same market or among different markets. We will, if necessary, consider these questions in the context of a petition for rulemaking filed by McCaw Cellular Communications, Inc. to establish rules and regulations governing the transfer or assignment of cellular radio ownership interests which cross over the wireline set-aside structure of Section 22.902(b) of the Commission's Rules. Our action here is limited to the application of the 1 percent rule to applications for the same frequency block in a single market.

40. Accordingly, we will modify Section 22.921 of the Rules to adopt a 5 percent rule for active investors in publicly-traded corporate applicants and a 10 percent rule for passive investors in publicly-traded corporate applicants similar to the attribution standards for all corporate entities adopted in the *Multiple Ownership Decision.* For markets beyond the top-120, we will prohibit active investors in corporate applicants from having ownership interests of 5 percent or more in mutually exclusive applications. In the case of passive investors, we will not attribute ownership interests in corporate applicants of less than 10 percent.[62] These standards were adopted for the mass media services after a lengthy and comprehensive proceeding assessing the levels of stock ownership at which a corporate shareholder would be capable of affecting the affairs of the licensee. We conclude that minority interests below these levels are very unlikely to be characterized by the kind of control relationships that could result in abusive multiple application strategies. Moreover, these revised benchmarks for investors in corporate applicants will reduce the ascertainment burden on widely-held corporations as applicants can refer to the data provided under the stockholding disclosure requirements of the Securities and Exchange Commission providing for the collection and public availability of information on all entities holding 5 percent of the stock of large publicly-held corporations.[63] These new benchmarks will assure the availability of capital in the cellular service while still providing a sufficient barrier to lottery manipulation.[64]

41. The petitioners and commenters have also suggested that we adopt in this proceeding most of the remaining attribution rules adopted in the *Multiple Ownership Decision* including the use of a multiplier for determining attribution in vertical ownership chains and an exclusion for non-voting stock and qualified limited partnership interests. We will use the multiplier adopted in that decision here to attribute indirect corporate interests for purposes of implementing the 5 and 10 percent ownership benchmarks.[65] This will realistically reflect a party's attenuated interest in a corporate applicant when there are intervening corporations by

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[62] Passive investors include bank trust departments, insurance companies and mutual funds. We will classify passive investors using the guidelines set forth in the Multiple Ownership Decision, *supra,* at paras. 36-40.

[63] 15 U.S.C. § 78m(d).

[64] These revised benchmarks apply only to attribution of ownership interests in publicly-traded corporate applicants. We are retaining the one percent rule for attributing ownership in applications filed by privately-held corporations, partnerships, limited partnerships, sole proprietorships and other business entities, as discussed below.

[65] In the Multiple Ownership Decision, we adopted a multiplier providing that where a link in the ownership chain represents a percentage interest exceeding 50 percent, that link will not be included in the successive multiplication used to determine the cognizable status of ownership interests in the vertical chain. This pass through provision reflects the line of *de jure* control.

taking account of the diminution of involvement that results. Thus, any party's interest in an applicant which is indirectly held through a chain of companies will have the appropriate benchmark applied for determining attribution to the product of the percentage values of the successive stockholdings which lead to the applicant.[66]

42. In the *Multiple Ownership Decision,* we treated non-voting stock interests and qualifying limited partnership interests as non-attributable because in both cases the holder of that interest lacks the means to influence or control the activities of the issuing entity. In the mass media context, where our multiple ownership rules are designed to promote diversity of ownership in order to maximize diversity of programming and service viewpoints, these kinds of ownership interests may be ignored since such parties have little or no influence over programming content and viewpoints.[67] Here, however, our concern is to maintain consistency, simplicity and fairness in the lottery selection process by preventing schemes whereby an applicant may obtain a controlling or significant interest in more than one application in a market. In this context, treating limited partnership interests as non-attributable could allow the same individuals to have limited partnership interests in a number of mutually exclusive applicants and thus create a cumulative chance. Even with a 5 percent attribution benchmark, large numbers of limited partners could subscribe to multiple mutually exclusive applications in an attempt to have more than one chance at a significant ownership interest in a licensee. In a lottery context, the same potential exists if non-voting stock interests are either non-attributable or treated as voting interests. Therefore, we will not treat these ownership interests as non-attributable in the cellular lottery context and will maintain the 1 percent ownership limitation for these interests.[68] Our purpose in initially adopting the 1 percent rule was to protect the integrity of the lottery process by precluding an applicant from participating in more than one application

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[66] For example, assume that stockholder A owns 10 percent of company X, which owns 20 percent of company Y, which owns 60 percent of company Z, which owns 15 percent of company L, a cellular applicant. Under the multiplier approach, Y's interest in L would be 15 percent (the same as Z's interest because Y's interest in Z exceeds 50 percent), X's interest would be 3 percent (0.2 x 0.15) and A's interest would be 0.3% (0.1 x 0.2 x 0.15). Neither A nor X would have an attributable interest in L.

[67] We note that the attribution of limited partnership interests in the mass media context is the subject of a petition for reconsideration of the Multiple Ownership Decision.

[68] Even with a one percent rule, however, it may be possible for a creative applicant, using various financing, voting or other arrangements, to enter into such schemes. Accordingly, we emphasize our intent to carefully scrutinize any application which appears to be directed toward skewing the lottery or giving an individual or group control, or the opportunity to obtain control, over more than one mutually exclusive application. We will not allow parties who attempt to circumvent our lottery procedures to obtain a cellular license. See also note 26.

for a cellular license. On the basis of the record before us, we conclude that the public interest will be best served by limiting the opportunities for applicants to attempt to obtain an interest in more than one lottery chance for a cellular license unless there is an identifiable public benefit to be gained from the use of a different approach.[69]

43. Our experience with applications filed for markets 91-120, as well as the petitions on this issue, indicate that the problem with implementation of the 1 percent rule has been the burden it placed on widely-held corporations to identify less than 1 percent shareholders and the chilling effect this could have on the availability of capital for cellular systems. The modifications we announce today for ownership interests in publicly-traded corporate applicants should solve this problem while still effectively preventing a party from having a controlling or other significant interest in more than one mutually exclusive application. Given the potential for abusive application practices that similar treatment of non-corporate ownership interests and non-voting stock could engender, we conclude that the public interest favors retaining the existing cellular application ownership restrictions for these interests.

G. Miscellaneous

44. Mid-America Cellular Systems, Inc. (MACS) filed a petition for reconsideration asking that we delete certain language in the *Cellular Lottery Decision* which it interprets as redefining the comparative criteria for pending cellular proceedings in the top-30 markets. Specifically, MACS points to the statement in paragraph 19 that the designated issues in comparative proceedings for the top-30 markets "do not include a comparative inquiry into the benefits of a 'gold-plated', high-cost system or opposed to a 'no-frills', lower-cost system." It characterizes this observation as a radical deviation from established policy announcing for the first time that economic efficiency is not a basis of comparative evaluation in comparative cellular proceedings. MACS asserts that this modification of existing policy is outside the subject matter and legally permissible scope of the lottery proceeding under the Administrative Procedure Act and is prejudicial to the rights of top-30 market applicants whose proposals are still under consideration.

[69] We recognize that non-voting stock and limited partnership interests are used by enterpreneurs to raise capital for new ventures, such as cellular systems. Our action here does not prevent the use of these ownership forms, but simply limits them to one application per frequency block in a market. Given the generally widespread availability of financial support for cellular systems, the record does not support the conclusion that continuing to apply the 1 percent rule to limited partnership interests and non-voting stock interests will significantly restrict the availability of financial support for new cellular systems.

45. Radiophone, Inc. filed an opposition characterizing MACS' arguments as frivolous. It states that although each of the comparative issues[70] developed for the top-30 comparative proceedings contains an element of economic efficiency considerations, the Commission has never held that economic efficiency *per se* is the focus of comparison either under the designated issues or as a separate and distinct issue. Thus, Radiofone concludes that the complained-of language does not represent a departure from existing Commission policy.[71]

46. We will deny MACS' petition or reconsideration. As MACS points out, revision of the top-30 comparative criteria is outside the scope of this proceeding.[72] Accordingly, we did not intend to vary in any way the comparative criteria established in the respective designation orders for the top-30 markets. MACS appears to have taken our statement in paragraph 19 out of context and to have interpreted it in a manner intended to support its comparative position in certain top-30 proceedings.[73] In paragraph 19, we merely observed that the expedited comparative process is not well-suited to reaching qualitative determinations among divergent cellular proposals, particularly where the differences represent varying, but equally legitimate, approaches to such factors as technical design, marketing, staffing and organization and customer service. In other words, comparative factors which are concerned with service coverage and capacity, expansion ability, service proposals and rates do not bring into the comparative analysis the complex set of engineering, financial, marketing and service trade-offs that a prospective operator must make and do not enable us to make qualitative decisions regarding these diverse system approaches. Therefore, we suggested that if each competing proposal meets the basic technical criteria, it might not be in the public interest to prefer one particular system over another.[74] These observations were only intended to support the adoption of lotteries in markets other than the top-30 and not to revise the comparative process

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[70] Mutually exclusive non-wireline applications in the top-30 markets were designated for hearing on the following common issues: (1) geographic area and population coverages, the relative demand for service and ability to accommodate demand; (2) system expansion plans; and (3) each applicant's unique service proposal and rates.

[71] MCI filed comments noting that MACS concerns appear to be "well-taken" and that the complained-of language should not be relied upon.

[72] Cellular Lottery Decision, *supra*, para. 1 and n. 12.

[73] MACS was an applicant in the proceedings to select a nonwireline licensee in the New Orleans MSA and the Dallas-Ft. Worth MSA. In the New Orleans proceeding, Docket No. 83-717, MACS filed exceptions to the Initial Decision of Administrative Law Judge James F. Tierney, asserting that it should receive a preference in area and population coverage based on economic efficiency considerations. The Commission declined to award such a preference. Mid-America Cellular Systems, Inc., CC Docket No. 83-717, FCC 84-648 at para. 12, released January 10, 1985.

[74] Cellular Lottery Decision, *supra*, para. 19.

for the remaining top-30 proceedings. Therefore, we find no merit in MACS' petition.[75]

47. *Application Procedures.* In many of the filings for markets 91-120, the forms were filled out in a way that made it difficult for the staff to determine information necessary to log in or pre-screen applications. In some cases, the first page of the application did not reveal the applicant's name or the market and frequency block applied for. Information concerning the legal qualifications of the applicant was, in some instances, intermixed with engineering exhibits. Boilerplate exhibits concerning the application's design concepts and demand assessments were excessively lengthy. In addition, many applications were bound together inadequately or hazardously (e.g., exposed sharp-edged metal fasteners).

48. To streamline the application intake and prescreening process, we are adopting the following requirements[76] for all cellular construction permit applications filed henceforth:

(1) Applications must be enclosed in stiff covers and fastened securely along the left edge without exposed sharp edges (*e.g.*, looseleaf binders, plastic binding strips, covered metal clasps);

(2) The applicant's name and the market and frequency block applied for must appear on the cover and the first page of the application form;

(3) The initial Form 401 shall be the first item inside the cover followed by a table of contents;

(4) Exhibits shall be attached to the initial Form 401, with engineering data, frequency plan, and individual application forms for the cell-sites at the end; exhibits shall have tabs.

(5) Exhibits other than engineering, financial, and ownership, i.e., those specified by Sections 22.913(a)(4),(5),(7) and (9) shall not exceed three pages.

(6) In addition to map(s) with a scale of 1:250,000 indicating the CGSA and 39 dBu contours, an 8 1/2 by 11 inch reduced map shall be included.

49. These steps should reduce the bulk of future applications somewhat, as well as streamline processing. The exhibits we are limiting to no more than three pages in length are those that do not require extensive discussion in a lottery context where there are no comparative criteria, and where these issues are not indicative of the relative ability of an applicant to implement its proposal. Finally, we will require all future cellular applications to be filed in a "letter perfect" condition, and failure

[75] In the alternative, MACS contends that if economic efficiency is not a comparative factor, then there are no significant differences among top-30 applicants and we must use lotteries in these markets also. Given our resolution of MACS' basic economic efficiency contentions, its alternative argument is irrelevant.

[76] These non-substantive requirements are adopted as rules of practice and procedure, and accordingly, no notice of proposed rulemaking is required. *See* 5 U.S.C.(b)(3)(A).

to conform to this standard will constitute grounds for rejection of the application as unacceptable for filing.

50. In addition, because space is at a premium at the Commission, we are taking one further step to reduce the volume of applications. For all new station applications, two microfiche copies[77] must accompany the full-sized original and one paper duplicate. These will be used for public reference purposes. While we recognize that having microfiche copies of applications made will increase the complexity and expense of preparing filings somewhat, we do not believe this burden to be either excessive or unfairly placed on the applicant. There are numerous companies in the Washington area and in other major cities offering micrographic services on reasonable terms.[78] By using microfiche copies for public reference, we will be able to avoid the need for additional reference areas and associated personnel.

III. Conclusion

51. We are now well along in implementing the delivery of cellular radio service to the American public. We have authorized competing cellular systems in every top-90 cellular market and are moving quickly to advance the licensing process for the remaining cellular markets. In the *Cellular Lottery Decision,* we adopted lottery selection procedures to reduce the delay inherent in the comparative hearing process and expedite the nationwide implementation of cellular service. Our action here reaffirms our commitment to this licensing mechanism and our belief that it provides the best approach for expediting the availability of cellular service in the remaining markets. The refinements we have adopted today, in response to petitions for reconsideration as well as the staff's experience processing applications filed for lottery selection, will further streamline the licensing process by reducing the incentive for applicants to file "sham" or speculative applications and by ensuring that all applicants are qualified, and that each application itself is complete, easily read and ready for processing. With these refinements, we can proceed to process applications for the beyond 90 markets and thus provide nationwide the benefits of cellular service as quickly as possible.

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[77] The microfiche copies must be in a format similar to that used for the Federal Register: 3 by 5 inches positive microform, 24 x reduction, readably labeled at the top, enclosed in a paper jacket. The two microfiche copies must be in a clearly labeled envelope accompanying the original application.

[78] For example, one Washington area service will produce microfiche copies in small quantities for less than $15.00 per fiche, with a turn-around time of one week. This expense is nominal in comparison with the other expenses involved in filing cellular applications.

Ordering Clauses

52. Accordingly, IT IS ORDERED, That the Petitions for Reconsideration filed in this proceeding are GRANTED to the extent set forth herein, and are otherwise DENIED.

53. IT IS FURTHER ORDERED, That the Motion of Bluegrass Broadcasting Co., Inc. for Leave to File Supplementary Comments, the request of Harry J. Pappas and Fresno Mobile Radio, Inc. d/b/a California Portaphone for Leave to Supplement its Petition for Reconsideration, the Motion for Leave to File a Supplement to Petition for Reconsideration filed by Northwestern Indiana Telephone Company, Inc. and the Motion of Maxcell Telecom Plus, Inc. for Leave to Exceed Page Limitation are GRANTED.

54. IT IS FURTHER ORDERED, That Part 22 of the Rules ARE AMENDED as specified in Appendix B. These amendments and other policies adopted in this order will become effective 30 days after the publication of this document in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

*Appendix A-may be seen in FCC Dockets Branch, 1919 M Street, N.W., Washington, D.C.

APPENDIX B

47 C.F.R. Chapter I is amended as follows:

Part 22 - Public Mobile Radio Services

Subpart B - Processing of Applications

1. Section 22.33 is amended by revising paragraph (b) to read as follows:

Section 22.33 *Grants by Random Selection*

* * * * *

(b) Cumulative Chances for Partial Cellular Settlements.

(1) Top-120 Markets. The joint enterprise resulting from a partial settlement among mutually exclusive cellular applicants for any one of the top-120 cellular modified Metropolitan Statistical Areas, if entered into after the filing of individual applications by its members, will receive the cumulative number of lottery chances that the individual applicants would have had if no partial settlement had been reached.

(2) Markets Beyond the Top-120. In markets beyond the top-120 cellular modified Metropolitan Statistical Areas, the cumulative lottery chances described in paragraph (1) will be awarded to joint enterprises resulting from partial settlements among mutually exclusive wireline applicants only. Any joint enterprise resulting from a partial settlement among

mutually exclusive nonwireline applicants for markets beyond the top-120 will not be entitled to any cumulative lottery chances.

* * * * *

2. Section 22.913 is amended by revising the section heading, adding a new heading "Contents" to paragraph (a), adding a new sentence at the end of subparagraph (a)(2), revising subparagraph (a)(11), adding new paragraphs (b) and (c) and revising and redesignating existing paragraph (b) as (d) to read as follows:

Section 22.913. *Content and Form of Applications.*

(a) Contents. Applications for new stations or for modified facilities increasing the Cellular Geographic Service Area of existing stations shall be filed on FCC Form 401. The following exhibits shall be attached to any such application: original application. Applicants for other forms of cellular authorizations shall submit an original and two paper copies.

(d) Applications proposing modifications to existing stations which do not involve new facilities, a change in height or power of existing facilities, or a change in CGSA, may be filed on FCC Form 489.

3. Section 22.921 is revised to read as follows:

Section 22.921. *Ownership in applications for cellular service for markets below the top-90.*

(a) Markets 91 - 120. No party may have an ownership interest, direct or indirect, in more than one application for the same MSA market, or have a mutually exclusive application for the same non-MSA/non-NECMA area, except that interests of less than one percent will not be considered.

(b) Markets beyond the top-120.

(1) General. Except as otherwise provided herein, no party may have an ownership interest, direct or indirect, in more than one application for the same MSA market, or have a mutually exclusive application for the same non-MSA/non-NECMA area, except that interests of less than one percent will not be considered.

(2) Ownership interests in publicly-traded corporate applicants. Notwithstanding paragraph (b)(1) above, no party may have an ownership interest, direct or indirect, in mutually exclusive applications filed by publicly-traded corporations for an MSA market, or a non-MSA/non-NECMA area, except that interests of less than five percent will not be considered.

(c) Application. In applying the provisions of subsection (b), ownership and other interests in cellular applicants will be attributed to their holder and deemed cognizable as set forth below.

(1) Passive Investors. Investment companies, as defined in 15 U.S.C. 80a-3, insurance companies, and banks holding stock through their trust departments in trust accounts will be deemed to have a cognizable interest in a publicly-traded cellular applicant only if they hold 10 percent or more of the stock of the applicant. This provision applies only if an applicant in which such parties hold an interest certifies in its application that no such party has exerted or attempted to exert any influence or control over the officers of the applicant.

(2) Multiplier. Attribution of ownership interests in a publicly-traded cellular applicant that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50 percent, it shall not be included for purposes of this multiplication.

Offset Requirements
Television, Low Power

Commission adequately apprised all low power television applicants that it would strictly construe and enforce the "complete and sufficient" acceptance standard for low power television applications set out in Section 73.3564(a) of the Commission's rules, particularly with regard to accurate frequency offset information.
—*Charlotte TV Co.*

FCC 85-386

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of Charlotte TV Company For a Construction Permit for a New Low Power Television Station on Channel 48 in Charlotte, North Carolina	File No. BPTTL-810331EN

MEMORANDUM OPINION AND ORDER

Adopted: July 24, 1985; Released: July 30, 1985

BY THE COMMISSION:

1. The Commission has before it an application for review, filed May 2, 1984, by Charlotte TV Company ("Charlotte") of an action by the Mass Media Bureau denying Charlotte's petition for reconsideration and returning its above-captioned application as unacceptable for filing.

2. Charlotte filed its low power television application on March 31, 1981, pursuant to the interim processing procedures in effect prior to the adoption of the *Low Power Television Report and Order*, 51 RR 2d 476 (1982) ("*LPTV Report and Order*"). When the Commission adopted a strict "complete and sufficient" acceptance standard in the *LPTV Report and Order*, it provided a ninety-day amendment period for all interim applicants, such as Charlotte, to bring their applications into compliance with the engineering standards of the new rules. *See Amendment*

Period, 51 RR 2d 1275 (1982). Charlotte amended its application on September 20, 1982, using a revised FCC Form 346, and the Application Amendment Guide ("Guide") which was provided by the Commission for the purpose of associating amendments with applications. In response to offset information requested in the Guide, Charlotte marked the box indicating "none."[1] Additionally, Charlotte marked "no offset" on the engineering page of the amendment (FCC Form 346, Section V, page 1, Question b). Charlotte's application was thus evaluated under a non-offset interference prediction standard. On January 4, 1984, the Mass Media Bureau returned the application as unacceptable for filing, because it was predicted to cause objectionable interference to full-service television station WGCG-TV, Channel 48, Greenwood, South Carolina, in violation of Section 74.705 of the Commission's rules.

3. Charlotte petitioned for reconsideration on January 26, 1984. Charlotte explained that, although its engineer had marked "none" in the offset portion of the engineering section of FCC Form 346 and the accompanying Guide to its 1982 amendment, Charlotte actually intended to propose "zero offset" as indicated in exhibits accompanying the amendment. If evaluated on a zero offset basis, Charlotte contended, no interference would be predicted to occur. Charlotte characterized the mistake as a clerical error, rather than a blatant defect warranting return of its application under Section 73.3564(a) of the Commission's rules. Citing the *LPTV Report and Order*, 51 RR 2d at 502, in which the Commission compared the new complete and sufficient standard to the acceptance criteria of the Domestic Public Land Radio Service ("DPLMRS") in Part 22 of the Commission's rules, Charlotte argued that the Commission was obliged to follow Section 22.31(e)(5) which permits the correction of typographical errors.[2]

4. The Bureau denied Charlotte's petition on April 10, 1984, on the ground that the complete and sufficient standard does not allow the staff to guess an applicant's intent with respect to inconsistencies in an application. Therefore, Charlotte's application was evaluated on the basis of the data in the engineering page of FCC Form 346 and found to be defective. The Bureau also noted that the acceptance criteria in Part 22 do

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[1] Frequency offset operation permits a less restrictive desired-to-undesired interference ratio between co-channel stations, thus allowing a greater number of stations to operate on the same channel. An application can propose operation with a plus, minus, or zero frequency offset designation, or operation without a frequency offset designation. For further discussion, *see Citizen Television Corporation*, FCC 85-83, released February 27, 1985, at 1, n.1.

[2] Section 22.31(e)(5) has since been revised and adopted as Section 22.23(g)(5). *Revision and Update of Part 22 of the Public Mobile Radio Services Rules*, 54 RR 2d 1661, 1679 (1983).

not take precedence over the criteria set forth in Parts 73 and 74 of the Commission's rules, which govern broadcast applications.

5. In its application for review, Charlotte questions (1) whether the Bureau properly interpreted Section 73.3564(a) in determining that Charlotte's application could be returned for a prediction of interference resulting from Charlotte's error in offset designation; and (2) whether Charlotte was fairly advised that the rule section would be so interpreted.

6. We have stated consistently that the complete and sufficient standard set forth in Section 73.3564(a) of the Commission's rules means that applications must be letter-perfect when filed. *See LPTV Report and Order*, 51 RR 2d at 501-502; *Reconsideration*, 53 RR 2d 1267 (1983); *American Christian Television System, Inc.*, (Channel 50, Vero Beach, Florida), 56 RR 2d 1445 (1984); *Kinetications, Inc.*, 56 RR 2d 1402 (1984) ("*Kinetications*"); *Local Service Television, Inc.*, FCC 84-571, released November 30, 1984 ("*Local Service*"); *Telecrafter Corporation*, 57 RR 2d 1127 (1985); *Citizen Television Corporation*, FCC 85-83, released February 27, 1985. *See also Neighborhood TV Company, Inc. v. FCC*, 742 F.2d 629, 644 (1984) (Commission has authority to adopt procedural rules aimed at implementing low power television service in an orderly, fair, and timely manner). In both *Kinetications* and *Local Service*, we emphasized the importance of maintaining a strict standard in the low power television service, especially with regard to engineering data which is essential to application processing. Clearly, Charlotte's mistake in specifying "no offset" when it meant to specify "zero offset" is a blatant defect under Section 73.3564(a), and transcends the "uncrossed t or undotted i" to which Charlotte analogizes its error. Moreover, we have refused to accept post-return corrective amendments because such acceptance would cause drastic delays in processing, due to the unique "daisy chain" effect in low power television processing.[3] *See Kinetications*, 56 RR 2d at 1404.

7. Charlotte's claim that the Commission did not give fair notice that the Bureau would enforce such a stringent standard is completely devoid of merit. In the *LPTV Report and Order*, 51 RR 2d at 502, we specifically stated that we were departing from the standard enunciated in *James River Broadcasting Corp. v. FCC*, 399 F.2d 585 (D.C. Cir. 1968), which allowed applicants to tender "substantially complete" applications. In that rulemaking proceeding, we gave notice that we were modifying our acceptability standards as they applied to the low power television service,

[3] One low power television application can directly or indirectly affect hundreds of other applications in a daisy chain effect, due to the contour overlap protection criteria used in low power television processing. Thus, technical amendments to returned applications would require modifications of the engineering data base and reprocessing of the same applications, which would increase processing time for all pending applications.

and cited the following passage from *Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 398, 401 (D.C. Cir. 1968):

> Perhaps the Commission can accommodate the various interests by adopting administrative expedients that, for example, explicitly require all applications to be letter-perfect when filed.

We explained that we were adopting this standard because our limited resources and the large number of low power television applications to be processed would not permit the staff to coach applicants in correcting defects or omissions in applications. *LPTV Report and Order*, 51 RR 2d at 502. Nevertheless, Charlotte would have us engage in precisely this type of coaching with its own application.

8. Furthermore, in the *LPTV Report and Order*, 51 RR 2d at 496, the Commission informed all applicants that specific frequency offset information would be required, and in the *Amendment Period*, 51 RR 2d at 1276, we directed all applicants to specify one of three possible frequency offset designations, if such offset operation was desired.[4] We believe that such clear and comprehensive instructions meet the requirements for full and explicit notice outlined in the *Radio Athens* case. Furthermore, in a number of recent cases, we have affirmed the Bureau's return of applications for lack of accurate offset information. *See Garnerlynn Communications* (Channel 5, Cape May, New Jersey), 58 RR 2d 150 (1984); *TV Board of First Assembly of God Church in Winter Haven, Florida, Inc.*, 58 RR 2d 144 (1985). As the United States Court of Appeals for the District of Columbia Circuit said in *Ranger v. FCC*, 294 F.2d 240, 242 (D.C. Cir. 1961): "We think an applicant for a [radio] license who either ignores or fails to understand clear and valid rules of the Commission respecting the requirements for an application assumes that risk that the application will not be acceptable for filing." It is apparent that Charlotte was negligent by not adhering to our instructions relating to offset information, and assumed the risk that its application would be returned as defective. *See also Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir 1976) (FM applicant who ignored reasonably comprehensive requirements could not complain about lack of notice).

9. Charlotte contends, however, that the Commission led applicants to rely on the DPLMRS acceptance criteria in Part 22 of our rules, as an indication of the stringency of the new low power television acceptance standard in Section 73.3564(a). Specifically, Charlotte refers to the

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[4] Charlotte also contends that the distinction between a "no offset" and a "zero offset" designation is an elusive one which is confusing to the "uninitiated." However, we have discussed and clearly delineated the different frequency offset designations in a number of places, including Section 74.705(d)(1)(i) of our rules, the *LPTV Report and Order*, 51 RR 2d at 496, and the *Amendment Period*, 51 RR 2d at 1276.

Commission's language describing the complete and sufficient standard in the *LPTV Report and Order*, 51 RR 2d at 502:

> It resembles, rather, the acceptance criteria of Part 22 of our rules, which requires complete applications, and return of blatantly defective applications. *See, e.g.* Sections 22.31(b)(2) and 22.32(b)(1) of the rules.

Charlotte points out that since Section 22.31(e)(5), for example, (now Section 22.23(g)(5)) specifically permits the correction of typographical errors, Section 73.3564(a), by analogy, should not preclude the filing of corrective amendments for errors in offset designation. In support, Charlotte cites prior DPLMRS cases in which the Commission allowed applicants to file corrective amendments. Given the serious nature of Charlotte's errors in offset designation, however, they could not be reasonably classified as mere typographical errors, because it was not obvious to the Bureau staff that Charlotte intended to specify "zero offset."[5] In any event, our comparison of the low power television acceptance standard to the DPLMRS acceptance standard served merely as an example of another service which had departed from the "substantially complete" standard. In making such a comparison, we did not refer specifically to Section 22.31(e)(5) anywhere in the *LPTV Report and Order*, nor did we state that typographical errors would be correctable. Therefore, it was unreasonable for Charlotte to assume that the two standards would be identical.[6]

10. Based on the foregoing, we believe that the Bureau fully considered and properly decided the matter. Consequently, Charlotte's application for review will be denied.

11. Accordingly, IT IS ORDERED, That pursuant to Section 1.115(g) of the Commission's Rules, the application for review filed by Charlotte TV Company IS DENIED.

12. IT IS FURTHER ORDERED, That the Mass Media Bureau send a copy of this *Memorandum Opinion and Order* by Certified Mail - Return Receipt Requested to the applicant named herein.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[5] Contrary to Charlotte's contention in its application for review that a single reference to "no offset" appears in the Guide, Charlotte specified "no offset" in both the Guide *and* in the engineering page of FCC Form 346, and referred to "zero offset" only in its ancillary engineering exhibits.

[6] As its final argument, Charlotte notes that the staff itself occasionally makes mistakes which are then corrected. This point is irrelevant to the facts at hand or to the application of a complete and sufficient standard to low power television applicants. Obviously, the Bureau is correct in reinstating applications which have been erroneously returned.

Application, Amendment of, After Designation
Character Qualifications, Lack of Candor, See Also Candor
Financial Qualifications, Availability of Funds

Hearing proceeding remanded to determine whether surviving applicant made intentional misrepresentations about its financial proposal. FCC overturns Review Board's determination that applicant is not financially qualified. Mass Media Bureau ordered to assess applicant's updated financial showing and recommend to ALJ whether further hearings on this matter are required.
—*Christian Children's Netwk., Inc.*
BC Docket No. 80-461

FCC 85-461

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of	
Christian Children's Network, Inc. Corpus Christi, Texas	BC Docket No. 80-461 File No. BPCT-791026KI
For Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: August 9, 1985; Released: August 13, 1985

BY THE COMMISSION:

1. The Commission has before it: (a) an Application for Review of the Review Board's Decision herein[1] filed by Christian Children's Network, Inc. (Christian) on November 14, 1983; and (b) an Opposition to (a) filed November 29, 1983, by the Chief, Mass Media Bureau.

2. In its June 1983 Decision, the Review Board granted the application of Coastal Bend Family Television Inc. (Coastal) for authority to Construct a new UHF television station in Corpus Christi, Texas. The Board

[1] *Coastal Bend Family Television, Inc.*, 94 F.C.C. 2d 648 (1983), *reconsideration denied*, 95 F.C.C. 2d 551 (1983).

found Christian financially unqualified to be a Commission licensee.[2] The Board also assessed Christian a substantial demerit for lack of candor in claiming that it could expect revenues from pre-sold time where the proposed buyer had specifically disavowed any intent to purchase such time. Further, the Board concluded that if Christian had been found financially qualified, this proceeding would have to be remanded for further hearings to determine whether Christian was guilty of making misrepresentations with regard to its initial financial plan. Subsequently, in October 1983, the Board granted Coastal's request to have its application dismissed. The Board also rejected Christian's further attempt to amend its financial proposal as dilatory and denied its petition for reconsideration of the Board's Decision.

3. In its initial application, Christian relied on the sale of land it purportedly owned to finance its proposal. On September 10, 1980, Christian notified the Commission that it did not, in fact, own the land it had specified. Christian did not have a financial proposal until it filed a petition for leave to amend on May 12, 1981, which was the first day on which hearing sessions were held and about one month after hearing exhibits were scheduled to be exchanged.[3] Subsequently, the ALJ ruled that Christian had not demonstrated good cause for filing its amendments in an untimely fashion and he denied the petition for leave to amend.[4] However, the ALJ ultimately reconsidered his ruling, accepted Christian's financial amendments, and concluded that Christian was financially qualified.

4. In its June 1983 Decision, the Review Board examined the circumstances surrounding the filing of Christian's financial amendments, so that it could make a determination as to whether Christian had demonstrated good cause for submitting the belated amendments. The Board concluded that Christian had not demonstrated good cause. 94 F.C.C. 2d at 653-55. While the Board's ruling would in the usual situation be persuasive, here there are extraordinary circumstances which raise questions as to whether such a procedural holding should be sustained. Thus, although the ALJ initially rejected Christian's amendment for lack of good cause, after all hearing sessions were completed, he reconsidered

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[2] Although the Commission currently allows broadcast applicants to certify that they are financially qualified pursuant to our *Revision of Form 301*, 50 R.R. 2d 381, 382 (1981), this procedure was not available to Christian since Christian's application was designated for hearing prior to the time that the Commission initiated the certification procedure and since the certification procedure cannot be used to meet an existing financial issue. *See South Florida Broadcasting Company*, 94 F.C.C. 2d 452 (1983).

[3] Christian made further submissions concerning its financial proposal to the ALJ on May 18, 1981 and to the Review Board on April 7, 1983 and July 22, 1983.

[4] Transcript, p. 719.

and found Christian financially qualified in his Initial Decision.[5] In light of this substantive holding, it appears that a denial of Christian's application on entirely procedural, good cause grounds would be of questionable validity.[6] Absent other developments, Christian's financial qualifications would be assessed on the basis of the substantive showing considered by the ALJ. However, after the ALJ issued his ruling, Christian again modified its financial proposal, see note 3 *supra*, so that the ALJ's substantive ruling can not be considered final.[7]

5. Christian's revised financial plan relies on loans from two persons who propose to mortgage or sell certain parcels of real property appraised by third parties to obtain the money which they intend to lend to Christian. Although the Board recognized that there are Commission precedents which allow an applicant to use net worth figures to prove the availability of cash representing a small fraction of a lender's net worth,[8] it concluded that the ratios of net worth to cash in those cases were greater than those in the instant case.[9] The Board failed to recognize, however, that we allow an entity which plans to lend money to an applicant to demonstrate the availability of such funds by relying upon projected proceeds from real estate, if it provides relevant appraisals and specifies the mortgages held against those real estate assets, without regard to the specific net worth ratio.[10]

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[5] *See* paragraphs 49 and 50 of the Initial Decision, 94 F.C.C. 2d 661 (1983). In this regard, we agree with the Board that the Initial Decision is incorrect to the extent it indicates that we intended to relax existing financial qualifications standards when we created the financial certification procedure. *See Revision of Form 301*, 50 R.R. (P&F) 2d 381, 382 (1981), wherein we explicitly stated that we were not changing the financial qualifications standards. In addition, as we observed in footnote 2, *supra*, the certification process was not available to Christian in any event because its application was designated for hearing prior to the implementation of the financial certification procedure.

[6] This determination is prompted by the particular circumstances of this specific case and thus we are in no way relaxing the ordinary good cause requirements of *Erwin O'Conner*, 22 FCC 2d 140 (1970). In this regard, we wish to emphasize that there was ample support for ALJ's original, negative good cause finding and that we expect *Erwin O'Conner* to be strictly applied. *Cf. Chudy Broadcasting Corporation*, FCC 85-193, released April 19, 1985, at note 7.

[7] This modification was occasioned by the withdrawal of a $50,000 line of credit from Christian Television Services, Inc. Based on this circumstance, together with our ruling herein on the good cause question, we shall grant Christian's petitions for leave to amend its application filed April 7, 1983, and July 22, 1983, and accept the pertinent amendments.

[8] *See e.g., International Broadcasting Co.*, 3 F.C.C. 2d 449, 451 (1966).

[9] The Board also found that the two lenders had not supplied evidence of the marketability or liquidity of their real estate assets pursuant to *Kaye-Smith Enterprises*, 90 F.C.C. 2d 105, 109 (1982).

[10] *See* paragraph 4(b), p. 3, Section III of the 1977 version of FCC Form 301, which contains instructions for demonstrating an applicant's financial qualifications; *Dodge-Point Broadcasting Co.*, 11 F.C.C. 2d 751, *affirmed*, 13 R.R. 2d 274 (1968) and *Rose Broadcasting Co.*, 68 F.C.C. 2d 1242, 1246 n.9 (1978). In our view, the Board's reliance on

6. We will not, however, attempt to resolve the financial aspects of this case at this time. A cursory examination of this matter reveals factual elements of a sort usually handled in the initial processing of an application or during the evidentiary hearing, not the kind of legal or policy questions regularly and appropriately presented in conjunction with the final appellate review of an adjudicatory proceeding. Under these circumstances, we believe that the approach which we set out below will be most conducive to the orderly and expeditious disposition of the Commission's business. In this regard, the Mass Media Bureau, which will have a role as a party with respect to the misrepresentation issue hereinafter specified, is directed: (a) to make an assessment of Christian's present financial showing on its own merits and (b) to make a recommendation to the presiding ALJ who will make a determination as to whether Christian may be found financially qualified by summary decision or whether evidentiary hearings are necessary on this matter.

7. As noted above, based on our review of this case, we concur with the Review Board that the ALJ erred by not specifying an issue to determine whether Christian was guilty of making misrepresentations with regard to its original financial plan. Christian's initial application filed October 26, 1979, provided that its costs would be met by proceeds from the sale of "37 acres of prime real estate in downtown Corpus Christi." Christian also filed a financial amendment in August 1980 in which it continued to rely on proceeds from that property to meet its initial costs. In fact, Christian did not own the land in question and so informed the Commission of that fact on September 10, 1980. For the reasons stated by the Review Board at paragraphs 3 through 5 of its Decision, 94 F.C.C. 2d 648 (1983), we are remanding this proceeding to determine whether Christian was guilty of intentionally misrepresenting its ability to rely on proceeds from the sale of 37 acres of prime real estate in downtown Corpus Christi, Texas, to finance its proposed station, and if so, whether the applicant is qualified to be a Commission licensee.

8. ACCORDINGLY, IT IS ORDERED, That the Application for Review of the Review Board's Decision herein filed November 14, 1983, by Christian Children's Network, Inc. IS GRANTED to the extent indicated in this Memorandum Opinion and Order and IS DENIED in all other respects; that the Review Board's Decision, 94 F.C.C. 2d 648 (1983) and its Memorandum Opinion and Order, 95 F.C.C. 2d 551 (1983), ARE

Kaye-Smith, supra, was misplaced. While *Kaye-Smith* contained a conclusory statement that an applicant had not demonstrated the liquidity or marketability of certain stocks and real estate holdings, it did not delineate what showing is required with regard to real estate holdings, and it did not impose any stricter requirements than those specified by *Dodge-Point* and *Rose, supra.*

MODIFIED as reflected herein; and that the following issue is designated on remand:

> To determine whether, in its initial application to the Commission, Christian Children's Network, Inc. intentionally misrepresented its ability to rely on proceeds from the sale of 37 acres of prime real estate in downtown Corpus Christi, Texas, to finance its proposed station; and if so, whether the applicant is qualified to be a Commission licensee.

9. IT IS FURTHER ORDERED That the petitions for leave to amend Christian Children's Network, Inc.'s application filed April 17, 1983, and July 22, 1983, ARE GRANTED and the relevant amendments ARE ACCEPTED for filing.

10. IT IS FURTHER ORDERED That this proceeding IS REMANDED to the presiding Administrative Law Judge for the production of evidence on the issue specified above and for the preparation of a Supplemental Initial Decision.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Antenna, Height of
Appeal, Sustained
Application, Amendment of, Engineering Change

Review Board granted appeal from ALJ's ruling which rejected applicant's amendment, filed 39 days after hearing designation, that proposed to lower its antenna height to conform to FAA requirements. Amendment conferred no comparative advantage, mooted air hazard issue and required no additional issues, did not prejudice competitor, and did not disrupt hearing.
—*Circle L. Inc.*
MM Docket No. 85-50

FCC 85R-61

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Circle L, Inc.	MM Docket No. 85-50 File No. BRCT-830531KP
For Renewal of License of Station KCRL-TV Reno, Nevada	
Washoe Broadcasting Company	File No. BPCT-830531KM
For Construction Permit Reno, Nevada	

MEMORANDUM OPINION AND ORDER

Adopted: July 26, 1985; Released: July 31, 1985.

BY THE REVIEW BOARD:

1. Washoe Broadcasting Company, whose application is mutually exclusive with the Circle L, Inc. (KCRL-TV) renewal application for Station KCRL-TV, Reno, Nevada, has filed an interlocutory appeal authorized by presiding Administrative Law Judge Byron E. Harrison,

Memorandum Opinion and Order, FCC 85M-2232, released May 23, 1985. Washoe requests that the Review Board reverse the ALJ's ruling which denied that portion of Washoe's petition for leave to amend, filed April 22, 1985, proposing a reduction in the height of its proposed antenna tower in order to obtain a no air hazard determination from the Federal Aviation Administration (FAA), Memorandum Opinion and Order, FCC 85M-2066, released May 13, 1985. We grant Washoe's appeal for the reasons set out below.

2. *Background.* As originally filed on May 31, 1983, Washoe proposed a tower and antenna with overall height above ground level of 1010 feet. FCC 85M-2066, *supra*, at para. 5. On June 26, 1984, the FAA notified Washoe that its proposal would exceed FAA obstruction standards and would be presumed to be a hazard to air navigation. KCRL-TV Opposition, filed June 18, 1985 (Attachment). However, the FAA also indicated that a height of not more than 480 feet would not exceed the obstruction standards. *Id.*

3. Some eight months later, this proceeding was designated for hearing and an air hazard issue was specified against Washoe. Hearing Designation Order, 50 Fed. Reg. 10311, published March 14, 1985. Thirty-nine days after designation for hearing, Washoe filed the amendment at issue, specifying the exact same antenna site, but reducing the antenna height from 1010 to 480 feet to comply with FAA requirements. (The FAA has since certified that Washoe's 480-foot amended proposal would not be a hazard to air navigation. Washoe Appeal, filed June 3, 1985 (Exhibit B)). The ALJ denied Washoe's petition for leave to amend because he found the amendment to be neither unforeseeable pursuant to Section 73.3522(b)(1)(i) of the Rules, 47 CFR 73.3522(b)(1)(i), nor diligently filed. FCC 85M-2066, *supra*, at paras. 3, 8 (Discussion) through 11. This appeal ensued.

4. *Discussion.* We note at the outset that no change in antenna site is proposed by the Washoe amendment. Thus, there is no question before us of whether Washoe has (or had) reasonable assurance of site availability, and therefore the recent cases taking a strict approach to site amendments are not controlling here. Moreover, those cases are distinguishable on their facts. For example, in *Shoblom Broadcasting, Inc.*, 95 FCC 2d 444 (Rev. Bd. 1983), *aff'd mem. sub nom. Royce International Broadcasting Co.* v. *FCC*, No. 84-1168 (D.C. Cir. April 30, 1985), the applicant lacked good cause to amend because its belatedly proposed site move was disruptive of the hearing, prejudicial to competing applicants, and its application was filed without reasonable assurance of the original site's availability. *See* 93 FCC 2d 1027, 53 RR 2d 1203 (Rev. Bd. 1983). *Cf. Cannon Communications Corporation*, FCC 85R-59, released July 30, 1985; *Houston Family Television, Ltd.*, FCC 85R-56, released July 10,

1985; *Valley FM Radio*, 99 FCC 2d 924, 57 RR 2d 420 (Rev. Bd. 1984) (dilatory conduct coupled with actual or possible deception).

5. Here, however, Washoe has amended merely to lower its height upon the same antenna tower as originally proposed in order to garner FAA approval, and it has acceded, as it must, to the negative consequences of its amendment that it will bear under the comparative coverage issue, Washoe Appeal at note 2. We find that the amendment: (a) confers no comparative advantage on Washoe, but actually diminishes the applicant's coverage of area and population; (b) moots the designated air hazard issue and requires no additional issues beyond those required by its original proposal;[1] (c) would not prejudice KCRL-TV because it serves merely to prevent its competitor Washoe's disqualification; and (d) was filed three weeks before the initial pre-hearing conference on May 13, 1985 and, therefore, clearly has not disrupted the hearing. On balance, these equities manifestly outweigh Washoe's failure to exercise due diligence in permitting eight months to elapse between FAA notification of its original air hazard problem and the filing of its curative amendment. *See Commanche Broadcasting, Inc.*, 97 FCC 2d 1059, 1061-1062, 56 RR 2d 289, 291-292 (Rev. Bd. 1984), and cases cited therein.

6. Moreover, while the Commission's procedural rules are designed to protect the interests of orderly administration and finality, they must be applied in a manner that ensures that rigidity does not override those purposes, justice, or equity. *Son Broadcasting, Inc.*, 92 FCC 2d 450, 452, 52 RR 2d 1017, 1018 (Rev. Bd. 1982) (affirming acceptance of engineering amendment which allegedly was foreseeable). To deny Washoe's amendment, here, and in effect to mandate its disqualification, is too harsh a remedy where that applicant's amendment was filed only 9 days after the expiration of the period for filing amendments as a matter of right to respond to issues first raised in the hearing designation order, 47 CFR §73.3522(b)(2). *See id.; cf. GAF Broadcasting Co.*, 96 FCC 2d 411, 55 RR 2d 827 (Rev. Bd. 1984). For these reasons and for those set forth in paragraph 5, above, we reverse the ALJ and fully accept Washoe's amendment.

7. ACCORDINGLY, IT IS ORDERED, That the Interlocutory Appeal filed June 3, 1985 by Washoe Broadcasting Company IS GRANTED, and that the engineering portion of the amendment accompanying the Petition

[1] Washoe has filed a request with the ALJ for the addition of a comparative coverage issue. However, because its original engineering proposal would serve an even larger area, Tr. 13, the possible need for adding this issue would not be obviated by denial of the amendment.

for Leave to Amend filed April 22, 1985 by Washoe Broadcasting Company IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

Common Carrier
National Defense
Telephone Company, Independent

Commission adopts Third Further Notice in CC Docket No. 81-893 which proposes the deregulation of: (1) National Security and Emergency Preparedness embedded CPE owned by Independent telephone companies; and (2) other CPE still subject to tariff.
—*Customer Premises Equipment*
CC Docket No. 81-893

FCC 85-345

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Service (Second Computer Inquiry)	CC Docket No. 81-893

THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: July 5, 1985; Released: July 12, 1985

BY THE COMMISSION:

I. Introduction

1. This *Notice* proposes, and seeks comment on, a structure for the detariffing of embedded customer premises equipment (CPE)[1] that is (i)

[1] In the *Second Computer Inquiry* proceeding, we defined "CPE" to include all equipment provided by common carriers in the fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands and located on customer premises, except over-voltage protection equipment, inside wiring, coin-operated or pay telephones, and multiplexing equipment to deliver multiple channels to the customer. Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Memorandum Opinion and Order on Further Reconsideration, 88 FCC 2d 512, para.1 n.1 (1981) (hereinafter *Further Reconsideration Order*). We also defined "embedded" CPE as "that equipment or inventory, which is tariffed or otherwise subject to the jurisdictional separations process as of the bifurcation date [January 1, 1983]," and "new" CPE as "[a]ny other CPE which is acquired by a carrier or manufactured by an affiliated entity after [the bifurcation date]." *Id.* at para. 45. Mobile customer premises equipment was defined in Procedures for Implementing the Detariffing of Customer Premises Equipment (Second

owned by Independent telephone companies (ITCs or "Independents"),[2] (ii) tariffed at the federal or state level, and (iii) used by the Federal government for national security and emergency preparedness (NSEP) functions.[3] The proposed plan seeks to accomplish detariffing of this ITC-owned NSEP CPE in a manner that is consistent with the principles and goals we have established in the *Second Computer Inquiry*.[4] This Notice also seeks comment on the procedures for the deregulation of any remaining new or embedded CPE that is still subject to tariff and that has not been, or is not being, addressed in other notices or orders.[5]

Computer Inquiry), Second Report and Order, 98 FCC 2d 814, para. 1 n.1 (1984) (hereinafter *Second Order*). (This equipment had been excluded from the original *Second Computer Inquiry* deregulatory decisions on CPE. *See infra* note 49.) Furthermore, there may still be some equipment subject to tariff that does not fall within either the *Second Computer Inquiry* or the *Second Order* definitions of CPE, but should be considered "customer premises equipment" and should be detariffed. *See, e.g., infra* note 51. As explained more fully *infra*, we invite comment on the detariffing of such equipment.

[2] For purposes of this proceeding, Cincinnati Bell Telephone Company (CBT) and Southern New England Telephone Company (SNET) are included among the Independent telephone companies.

[3] Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. §151 (1982), provides that two of the goals the FCC should pursue in exercising its regulatory mandate over interstate and foreign communications are to assist in the national defense and to promote the safety of life and property. *See* Exec. Order No. 12,472, 49 Fed. Reg. 13,471 (1984) and 47 C.F.R. §§201.0-215.2 (1984).

[4] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (hereinafter *Final Decision*), *modified on reconsideration*, 84 FCC 2d 50 (1980) (hereinafter *Reconsideration Order*), *modified on further reconsideration*, 88 FCC 2d 512 (1981) (hereinafter *Further Reconsideration Order*), *aff'd sub nom. Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further reconsideration*, FCC 84-190 (released May 4, 1984) (hereinafter *Second Further Reconsideration Order*).

[5] One exception to the broad scope of this proposed detariffing of all remaining CPE subject to tariff is the embedded CPE owned by the Bell Operating Companies (BOCs) that was not transferred to AT&T at divestiture. This category of CPE will be addressed in a subsequent rulemaking. It includes 911 Public Safety Answering Point CPE, concentrator-identifier systems associated with telephone answering service systems, network channel terminating equipment (such as terminating sets, subscriber pair gain equipment, and repeaters), 101 ESS switches used in providing Centrex-CU service, Centrex-CO attendant position equipment (including Centrex consoles and console cabinets), CPE located at Public Service Answering Points used in connection with 911 emergency service, and 60-type console control cabinets and mini-computers associated with ESS-ACD (Automatic Call Distributer) service. *See* AT&T Plan of Reorganization at 82-86, United States v. AT&T (filed Dec. 16, 1982). Coin or pay telephones are specifically excluded from the definition of CPE. *Reconsideration Order*, 84 FCC 2d at 61 n.10. We recently reaffirmed that public and semi-public telephones may remain tariffed. See Petition for Declaratory Ruling of Tonka Tools, Inc. and Southern Merchandise Corp. Regarding American Telephone and Telegraph Company Provision of Coinless Pay

Specifically, we seek comment on: (1) detariffing procedures for federally tariffed embedded mobile CPE that has already been deregulated; (2) leaving the decision of whether or not to detariff ITC-owned 911 equipment to the states rather than requiring deregulation by December 31, 1987; and (3) deregulating any new or embedded CPE used in conjunction with Part 81 licensed maritime common carrier services.

II. General Background

2. In the *Second Computer Inquiry*, we concluded that "CPE is a severable commodity from the provision of transmission services and that regulation of CPE under Title II [of the Communication Act of 1934] is not required and is no longer warranted."[6] We concluded in subsequent proceedings in the *Second Computer Inquiry* that "continued provision of CPE by common carriers under regulation impedes the evolution of a truly competitive CPE market".[7] With regard to detariffing CPE, the Commission decided to deregulate new and embedded CPE separately.[8] New CPE was detariffed on January 1, 1983, while the detariffing of embedded CPE began after the completion of a separate "implementation proceeding", which addressed "issues of capital recovery and asset valuation, alternative mechanisms by which transition to an unregulated CPE environment may be achieved, and the appropriate time period for removal of embedded CPE investment from separations and a carrier's rate base."[9] We indicated that special treatment of embedded CPE was necessary in order to avoid the significant dislocations that could result from immediate detariffing.[10]

3. Several Commission Orders in this docket have implemented the *Second Computer Inquiry* decisions requiring detariffing of embedded CPE.[11] In the *First Order*, we required the transfer of embedded CPE

Telephones, Memorandum, Opinion and Order, FCC 85-269, (released May 22, 1985). In a previous decision, however, we determined that "extensions" to semi-public telephones are CPE. *See* Modifications to the Uniform System of Accounts, 48 Fed. Reg. 50,534 (1983). An extension is equipment attached to public, pay telephones typically located on private premises or in a private establishment and used by the owner or employees of the private establishment. This Notice covers other new or embedded CPE, if any, held by the BOCs that is still subject to tariff.

[6] *Final Decision* at para. 9.

[7] *Reconsideration Order* at para. 46. (citing *Final Decision* at paras. 144-59).

[8] *Reconsideration Order* at para. 49.

[9] *Id.* at para. 55 (footnote omitted).

[10] *Id.* at para. 48.

[11] This docket was initiated through the release of a Notice of Inquiry on April 13, 1982. Procedures for Implementing the Detariffing of Customer Premises Equipment (Second Computer Inquiry), Notice of Inquiry, 89 FCC 2d 694 (1982) (hereinafter *Notice of Inquiry*). On June 21, 1983, we released a Notice of Proposed Rulemaking, 94 FCC 2d 76 (1983) (hereinafter *Notice*). The Report and Order detariffing AT&T's embedded CPE was released on December 15, 1983, 95 FCC 2d 1276 (1983) (hereinafter *First Order*),

owned by AT&T at net book value plus transaction costs to an unregulated subsidiary, AT&T-IS, effective January 1, 1984,[12] and required that AT&T-IS provide a sale option to its embedded CPE customers. National sales prices are set for single-line equipment for a two-year price predictability period. For multiline equipment, the sales prices are not to exceed net book value plus transaction costs in the aggregate. Increases in lease prices are also controlled by the *First Order* for the two-year period ending December 31, 1983.[13]

4. In the *Third Order*, we established a framework for states to follow in deregulating ITC-owned embedded CPE tariffed at the state level. Subject to a minimum set of federal requirements, states are given the flexibility to develop an approach to detariffing that best meets the needs of customers and ITCs in their jurisdictions. We did not set a valuation standard for the transfer price, but rather allowed the states to determine the valuation mechanism.[14] States are required to certify to the

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modified on reconsideration, 50 Fed. Reg. 9016 (1985) (hereinafter *First Order Reconsideration*). On June 29, 1984, we released the *Second Order, supra* note 1, which detariffed embedded CPE used in mobile telephone service. A Second Further Notice of Proposed Rulemaking, released on June 20, 1984, 98 FCC 2d 361 (1984) (hereinafter *Second Further Notice*), sought comment on a framework to allow federal agencies to obtain NSEP equipment from AT&T and its subsidiaries and the Bell Operating Companies, and the Sixth Report and Order in this docket, 50 Fed. Reg. 1525 (1985) (hereinafter *Sixth Order*), established such a framework. The Third Report and Order, released on October 26, 1984, 99 FCC 2d 354 (1984) (hereinafter *Third Order*), *aff'd on reconsideration*, FCC 85-118 (released March 27, 1985), provides a framework for states to deregulate embedded CPE owned by the ITCs and tariffed at the state level. The Fourth Report and Order in this docket, 49 Fed. Reg. 47,265 (1984), released November 4, 1984, detariffed CPE provided by Western Union and the international record carriers. The Fifth Report and Order, released November 20, 1984, 49 Fed. Reg. 46,378 (1984) (hereinafter *Fifth Order*), *reconsideration pending*, addressed accounting matters involved in detariffing CPE.

[12] The principal rules regarding the treatment of any gains or losses in connection with the removal of utility assets from regulated service are set out in *Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n*, 485 F.2d 786 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 935 (1974) (hereinafter, together with companion cases, referred to as *Democratic Central Committee*). For a list of companion cases, see *First Order* at para. 56 n.48.

[13] In the *First Order*, we decided to detariff embedded CPE owned by AT&T quickly because of the then-imminent Bell System divestiture, but determined that, since divestiture did not apply to ITCs, we could decide on the detariffing of ITC-owned CPE in a future rulemaking. *First Order* at para. 174-76.

[14] States are subject to compliance with the principles of *Democratic Central Committee, i.e.*, "the right to capital gains on utility assets is tied to the risk of capital losses" and "he who bears the financial burden of particular utility activity should also reap the benefit resulting therefrom." *Democratic Central Committee*, 485 F.2d at 806. Therefore, gains or losses on transfer or sale of assets must go to the entity—carriers, investors, or ratepayers — that bore the risk of loss of capital value over the regulated life of the assets. For further discussion of this case, see *Third Order* at para. 39 n.28.

Commission by September 1, 1985, that they have developed plans to deregulate embedded CPE by December 31, 1987, in a manner consistent with the *Third Order*.[15]

5. While we have deregulated, or have established a framework for deregulation of, a substantial amount of embedded CPE, there are still certain categories of embedded CPE yet to be detariffed. In this proceeding we seek comment on our proposals to deregulate embedded CPE for which we did not receive substantial comment in prior proceedings, *i.e.*, NSEP equipment owned by Independents and tariffed at the state or federal level. We also propose to establish detariffing mechanisms for mobile CPE tariffed at the federal level. In order to complete in an orderly and timely fashion the deregulation of all CPE, we also seek comments in this Notice on the detariffing of any remaining CPE, new or embedded, for which we have not previously requested comments. Parties should provide information on the type of any such CPE, the entity responsible for the equipment, and a preferred valuation technique and deregulation date.[16] We seek to complete the deregulatory process with respect to all CPE as expeditiously as possible.

III. NSEP Equipment Owned by Independent Telephone Companies

A. Background

6. Previous rulemakings in this docket have not specifically addressed the deregulation of embedded NSEP equipment owned by ITCs. The *Notice* did not discuss the deregulation of NSEP equipment. The *Third Order*, which provided a framework for states to deregulate embedded CPE owned by Independents and tariffed at the state level, specifically excluded NSEP equipment[17] in order to provide for a consistent deregulatory process for all NSEP owned by ITCs, whether tariffed at the state or federal level.

7. In the *Second Further Notice*, we suggested several options for a framework under which certain federal agencies might obtain CPE needed for NSEP functions.[18] The options presented, and the majority of

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[15] In the *Second Order*, we detariffed state and federally tariffed mobile CPE owned by ITCs. States were allowed to establish the detariffing mechanisms, including establishing valuation. We propose detariffing mechanisms for federally tariffed ITC-owned mobile CPE herein.

[16] In response to the *Second Further Notice* in this docket, we received comments on the deregulation of federally tariffed CPE provided by the ITCs. The deregulation of this equipment (excluding federally tariffed, ITC-owned NSEP CPE), and CPE that remained with the BOCs at divestiture, described *supra* note 5, will be implemented in subsequent proceedings.

[17] *Third Order* at para. 27.

[18] *Second Further Notice* at paras. 9-11.

the responses received, however, focused only on AT&T's role in the provision of NSEP equipment. Accordingly, the *Sixth Order* established a framework, involving a permanent waiver of the *Second Computer Inquiry* separate subsidiary requirements,[19] under which AT&T Communications (AT&T-COM) and the BOCs could continue to act as a single point of contact for federal agencies to facilitate the operation, maintenance and servicing of 21 NSEP systems.[20] This waiver applies to both new and embedded NSEP CPE. The *Sixth Order* provided for the deregulation of embedded NSEP CPE owned by AT&T in a manner similar to that required by the *First Order* with respect to single and multiline CPE, *i.e.*, the equipment was transferred out of regulation at net book value plus transaction costs with a sales plan and two-year price predictability period. After careful review by the Commission of the

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[19] In the *Second Computer Inquiry*, we permitted AT&T to engage in the provision of CPE and enhanced services only through a separate subsidiary. We adopted this requirement to lessen the likelihood that AT&T's provision of CPE and enhanced services would result in harm to competition in these markets or cause ratepayers to fund CPE and enhanced service operations through the improper allocation of costs properly associated with these unregulated activities to AT&T's regulated services. *See Final Decision* at para. 208. We have recently issued a Notice of Proposed Rulemaking inviting comments on our proposal to relieve AT&T from structural separation requirements for the provision of CPE. *See* Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Company, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 50 Fed. Reg. 9060 (1985).

[20] The permanent waiver permits AT&T-C and the regulated BOC entities to maintain end-to-end responsibility for NSEP communications in cases of presidentially declared and other emergencies and on a continuous basis for the designated NSEP systems. *See Sixth Order* at para. 26, n.72. The Federal Executive Agencies (FEA) listed 21 NSEP systems and circuits as being covered by its request that CPE associated with NSEP functions not be detariffed and transferred to AT&T-IS. The Department of Defense systems were: Automatic Secure Voice Communications Network (AUTOSEVOCOM); Joint Chiefs of Staff Systems (JCS Alerting Network and Minuteman); Strategic Air Command Systems (SAC Primary Alerting System, SAC Operations Conference System, and SAC Command Post Command and Control Consoles); Northern American Air Defense Command (NORAD) Alerting System; Tactical Air Command Systems (TAC Command and Control Alerting Command and TAC Force Control Management System); Military Airlift Command (MAC) Operational Phone System; Air Force Digital Graphics System (AFDIGS); Air Force Command Post Alerting Network (COPAN); and Air Force Command Post Record Capability (COPREC). Also included was the U.S. National Airspace System in the Federal Aviation Administration. The Federal Emergency Management Agency Systems were: a classified FEMA system provided under AT&T Tariff FCC No. 260; Emergency Broadcast System; FEMA National Voice System; and FEMA National Warning System. The NRC Emergency Notification System in the Nuclear Regulatory Commission was also listed. The following White House Communications Agency systems and equipment were included: transportable electric consoles; and Echo Fox Radio System. *See First Order* at para. 171 n. 146, and *Sixth Order*, App. A.

impact of NSEP CPE deregulation on national security communications, deregulation of AT&T-owned NSEP became effective retroactive to January 1, 1984.[21] Although the *Sixth Order* did not address the provision of NSEP equipment by ITCs, we pointed out that ITCs could continue to act as a single point of contact for NSEP communications needs and that a specific waiver similar to that obtained by AT&T-COM and the BOCs would not be necessary since ITCs, unlike the AT&T-COM and the BOCs, are not restricted by the Commission-imposed separate subsidiary requirements.[22]

B. Discussion

8. Our goal in formulating this proposal for the deregulation of ITC-owned NSEP CPE is to effectuate the detariffing of this equipment in a timely manner, while also protecting the national security and the interests of ratepayers, in-place customers, and investors. Although we are convinced that the deregulatory policies of the *Second Computer Inquiry* can proceed without adversely affecting national security and emergency preparedness, we would like to provide interested parties with an opportunity for more detailed comment on the ITCs' NSEP CPE before we proceed to establish rules for deregulation.

1. State-tariffed NSEP

9. In response to the *Notice*, the Federal Executive Agencies (FEAs) opposed state-by-state sale of embedded CPE. In the *Third Order*, we determined that the benefits of allowing states flexibility in the detariffing of embedded CPE outweighed any inconvenience to some large users in having to deal with several state commissions.[23] We are convinced, however, that there is merit to the FEAs' objections with respect to NSEP CPE due to the unique concerns implicated in national security and emergency preparedness. Thus, we propose that ITC-owned NSEP CPE tariffed at the state level be tariffed along with federally tariffed, ITC-owned NSEP CPE, as proposed herein.

10. Additionally, in the *Second Computer Inquiry*, we required that AT&T provide embedded and new CPE through a separate subsidiary in order to eliminate the risk of cross-subsidization or other anticompetitive conduct.[24] While we chose not to place these requirements on ITCs,[25] we

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[21] *Sixth Order* at para. 34.

[22] *Id.* at para. 1 n.4.

[23] *Third Order* at para. 27. As we indicated in the *Third Order*, our findings that states may implement federal policy in deregulating ITC-owned CPE tariffed at the state level does not prejudice our decision in other areas where implementation at the national level is required. *See Third Order* at para.22 n.14.

[24] *See supra* note 19.

did not preclude states from requiring that an ITC establish a separate subsidiary for the provision of CPE.[26] However, when a state has imposed such a requirement on an ITC, problems similar to those addressed in the *Sixth Order*, regarding AT&T's ability to provide end-to-end service for NSEP requirements, may exist.

2. Federally Tariffed NSEP

11. In the *Second Further Notice*, we proposed a framework for deregulating federally tariffed embedded CPE owned by ITCs.[27] Since we did not require that ITC-owned CPE be handled through a separate subsidiary, as was required for AT&T, we are not aware of any special provisions that are needed in the deregulation of this federally tariffed NSEP equipment. As with other federally tariffed CPE owned by ITCs, the ITCs that provide NSEP CPE to the Federal Government vary in size.[28] We are aware of the need to assess the impact of our deregulatory policies on smaller ITCs. We seek comment on any special requirements in deregulating embedded NSEP CPE faced by the specified federal agencies, ITCs, and other interested parties in order to provide for the smooth deregulation of this equipment.

3. Definition of NSEP CPE

12. We also seek comment on the type of CPE that should be included as NSEP equipment subject to the detariffing provisions of this Notice. We propose to include any embedded CPE that is used in conjunction with a service or circuit that has been assigned a National Communications

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[25] In the *Reconsideration Order*, we found that separate subsidiary requirements would not be necessary for Independents. First, we indicated that opportunities for Independents to cross-subsidize were less than those for AT&T. Second, the costs of separation would be greater for Independents and might foreclose their entry into the enhanced service or CPE markets. *See Reconsideration Order* at para. 70.

[26] In the *Second Computer Inquiry*, we held that "if a state regulatory authority, focusing on the local activities of a carrier not subject to structural separation under our rules, perceived that the carrier's unregulated activities could lead to cross-subsidies or other anticompetitive conduct detrimental to basic service ratepayers, the state could apply structural separation conditions on that carrier." *Second Further Reconsideration Order* at para. 2.

[27] *See Second Further Notice* at paras. 20-4. As discussed *supra* note 16, the deregulation of federally tariffed, ITC-owned, non-NSEP embedded CPE will be addressed in a subsequent order.

[28] Central Telephone Co. indicated in its reply comments to the *Second Further Notice* that it provides in excess of $14 million of CPE to three Air Force bases, an Army facility, and an FAA air traffic control facility. Filings in Tariff 277 indicate smaller companies that provide CPE include Iroquois Telephone Co., Shenandoah Telephone Co., and Hardy Telephone Co.

System (NCS)[29] Federal Communications Commission approved restoration priority (RP) 1-4,[30] and is under contract to specified federal agencies.[31] This definition, although relatively broad,[32] ensures that NSEP communications are not hampered by the varied state detariffing procedures.[33] It also provides an opportunity for any further comment on any special requirements, should they be necessary, in order to provide a smooth transition to deregulation.[34] We seek comment on whether this definition should be limited to CPE in a specified set of NSEP systems.

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[29] The NCS includes the telecommunication assets of, and representatives from, "those Federal departments, agencies or entities, designated by the President, which lease or own telecommunications facilities or services of significance to national security or emergency preparedness, and to the extent permitted by law, other Executive entities which bear policy, regulatory or enforcement responsibilities of importance to national security or emergency preparedness telecommunications capabilities." Exec. Order No. 12, 472, 49 Fed. Reg. 13,471 (1984).

[30] *See* 47 C.F.R. Part 64, App. A, pp. 693-97. The Communications Act grants the FCC authority over the assignment of priorities for restoration of common carrier provided service, until such time as the applicable FCC rules are superseded by the President's emergency power. *Id.* at 693. A restoration priority system is "intended to restore only the most essential private line communications circuits in order to increase their reliability during emergencies." *Id.* All communications common carriers are directed by Appendix A of Part 64 of the Commission's Rules to honor and apply the restoration priority system.

[31] The federal agencies involved are the Department of Defense (DOD), the Department of Energy, the Department of the Interior, the Department of Transportation (including the Federal Aviation Administration and the Coast Guard), the General Services Administration, the Central Intelligence Agency, the Federal Emergency Management Agency, the National Aeronautics and Space Administration, the United States Information Agency, and the Nuclear Regulatory Commission. These agencies are hereinafter referred to as the "specified federal agencies."

[32] DOD originally argued that the AT&T waiver from the separate subsidiary requirements for the provision of NSEP CPE should include all RP systems. *CPE Waiver Order* at para. 11. In the *Bureau Waiver Order*, the waiver was limited to 21 systems due to the possible impact on competition. Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), Order in CC Docket No. 81-893, Mimeo No. 1705 (released Jan. 10, 1984) (hereinafter *Bureau Waiver Order*). The *Sixth Order* affirmed the 21-system limitation. *See supra* note 20.

[33] The use of this definition of NSEP is limited to this Notice and any orders issued in response to it.

[34] This definition does not adversely impact competition since these provisions apply to embedded NSEP CPE. New CPE provided to restoration priority systems and circuits is not regulated and is therefore open to competition. Embedded ITC-owned CPE not subject to the proposed detariffing provisions of this Notice (non NSEP CPE) and tariffed at the state level would be deregulated by states according to the provisions of the *Third Order*.

3. NSEP CPE Detariffing Requirements

13. We propose to deregulate ITC-owned NSEP CPE, tariffed at the state and federal level, in a manner similar to that proposed for all federally tariffed CPE in the *Second Further Notice*. We propose to: (1) deregulate ITC-owned NSEP CPE on January 1, 1986; (2) require that net book value[35] plus transaction cost be used as the valuation standard for the transfer of the equipment to unregulated books; (3) provide that customers have an opportunity to purchase the in-place equipment at any time during a two-year price predictability period following detariffing, at sales prices that in the aggregate do not exceed the net book value of the equipment; and (4) mandate that accounting requirements currently applicable to the offering of new CPE by companies that do not establish separate subsidiaries for such offerings would also apply to this detariffed CPE. We seek comment on whether we should establish a price predictability program, based on the requirements established for AT&T-IS in the *First Order*, under which month-to-month lease rates charged by the ITCs would be subject to established ceilings. Existing fixed-term leases applicable to this detariffed equipment would remain in effect according to their terms and would be enforceable by the ITC and customer involved.[36] The ITC would have to establish accounting mechanisms for the detariffed equipment that comply with the accounting and tax requirements we established in the *Third Order* for state-tariffed embedded CPE owned by the Independents and the *Fifth Order*.[37]

14. In the *Second Further Notice*, we indicated that, although the amount of federally tariffed embedded CPE provided by Independents may be small in comparison with the total amount of ITC-owned CPE, a significant portion of embedded CPE owned by a particular ITC may be subject to federal tariff. We are concerned about this possibility as it impacts NSEP CPE and, therefore, propose to allow for a waiver of the detariffing date to no later than January 1, 1989, in certain limited circumstances for those ITCs with a substantial amount of embedded

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[35] Adjustments to net book value would be made in accordance with the principles and rules adopted with respect to AT&T embedded CPE in the *First Order*. For AT&T, we found that "using net book value as a proxy for economic value 'has the advantage of extreme simplicity, and it may be the most prudent approach in some cases given the practical difficulties of implementing other alternatives'." *First Order* at para. 51 (quoting *Notice of Inquiry* at para. 12). We further concluded regarding detariffing of CPE owned by AT&T that a sale plan of embedded CPE, coupled with a plan for transferring the remaining CPE to unregulated service, was consistent with the equitable principles of *Democratic Central Committee*, since it properly accommodates the interests of both ratepayers and investors. *See Notice* at para. 32.

[36] *See* Memorandum Opinion and Order in CC Docket No. 81-893, FCC 85-220 (released May 15, 1985).

[37] *See Third Order* at paras. 43-45; *see also Fifth Order*.

NSEP equipment. The purpose of such waivers would be to ensure that our detariffing plan does not unduly disadvantage the ratepayers or investors of those ITCS, while at the same time adequately balancing the interests of CPE users. The waiver request must demonstrate that the ITC in question will not recover its investment in NSEP CPE if the CPE is detariffed on January 1, 1986, and that a substantial portion of the investment has not already been recovered through depreciation. We propose to limit this waiver to ITCs that are providing more than 20 percent of their embedded CPE base (in terms of net book value) to support the NSEP communications needs of the specified federal agencies.

15. We invite interested parties to comment on our proposal to deregulate NSEP CPE owned by ITCs, and to present and discuss other alternatives for the detariffing of this embedded NSEP equipment. We also invite interested parties to propose and discuss additional terms and conditions that may be necessary to ensure that the arrangements we propose herein accommodate ITCs and NSEP requirements in a manner consistent with the *Second Computer Inquiry* and a competitive CPE market.

4. State Separate Subsidiary Requirements

16. In those states where ITCs have been required to provide CPE through a separate subsidiary, we believe that any state-imposed limitations may need to be preempted for the effective provision of CPE for national security and emergency purposes,[38] including those situations under which priority restoration and similar requirements would necessitate participation by ITCs in ensuring the telecommunications requirements of NSEP.[39] As was the case with AT&T in the *Sixth Order*, we are concerned here that these state separate subsidiary requirements would preclude ITCs from responding on an "end-to-end" basis in providing new and embedded NSEP CPE.[40]

17. Where it is necessary to preempt any state-imposed limitations due to separate subsidiary or other requirements for the provision of NSEP

[38] These emergency situations include a presidentially declared disaster or emergency as defined in the Disaster Relief Act (42 U.S.C. § 5122) or other emergency as defined in DCA Circular 310-130-1, Chapter II, para. 2 (Feb. 1982). For the relevant text from the DCA Circular, see AT&T Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations with Respect to the Department of Defense and Specified Government Agencies, Memorandum Opinion and Order, 93 FCC 2d 632, para. 7 n. 6 (1983) (hereinafter *CPE Waiver Order*).

[39] *See supra* para. 10.

[40] *See Bureau Waiver Order* at para. 12 n.16 regarding the DOD's comments on the need for a single point of contact for emergency communications needs.

CPE, we propose to include: (a) the RP system discussed above,[41] (b) new or embedded CPE equipment that is utilized for any service or circuit required in support of emergency situations,[42] and (c) any new or embedded CPE required with respect to NSEP military exercise or special purpose services or circuits.[43]

18. Thus, we seek comment on the need for the Commission to preempt state subsidiary requirements[44] that do not allow ITCs to provide embedded, new, or replacement NSEP CPE[45] as part of an end-to-end service. We also seek comment on any limitations that should apply to ITCs in this case.[46]

IV. Other Embedded CPE

A. Background

19. As previously noted, the Commission in several Orders has proceeded to deregulate embedded CPE in a manner consistent with the requirements of the *Second Computer Inquiry*.[47] We seek in this Notice comment regarding the deregulatory framework for any new or embedded CPE that has not been addressed in a prior notice in this docket or has not been commented on.[48]

1. Mobile Telephone Equipment

20. In the *Second Order* in this proceeding, we detariffed all embedded CPE used in mobile telephone services that was provided by AT&T, ITCs, and radio common carriers (RCCs).[49] For AT&T, we decided to

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[41] *See supra* note 30.

[42] *See supra* note 38.

[43] Special purpose services/circuits include services/circuits used to support the President, Vice President, or activities conducted pursuant to the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-11.

[44] Only CPE associated with NSEP situations, as described *supra* para. 17, would be covered by the proposed preemption.

[45] The new or replacement CPE would not be tariffed and would not be added to the regulatory revenue requirements. Expenses incurred by ITCs in connection with making such arrangements would be recorded as "below-the-line" expenses.

[46] For example, in the *Sixth Order*, we placed restrictions on AT&T-COM and the BOCs in providing NSEP CPE to the Federal Government. *See also CPE Waiver Order* at paras. 15-17.

[47] *See supra* note 11.

[48] As noted above, this Notice excludes consideration of CPE owned by the BOCs that was not transferred to AT&T at divestiture, and non-NSEP federally tariffed CPE provided by the ITCs. *See supra* notes 5 and 16.

[49] Mobile telephone equipment was excluded from the decision to deregulate CPE in the *Second Computer Inquiry* because the status of this equipment was being examined in a separate cellular mobile radio proceeding. *See Final Decision* at para. 161 n.57; *Reconsideration Order* at para. 59. In the cellular proceeding, we ordered that mobile telephone equipment provided in conjunction with cellular systems be deregulated. Cellular Communications Systems, Report and Order, 86 FCC 2d 469 (1981), *modified on*

require the removal of embedded mobile CPE from regulated service in accordance with the conditions and requirements established in the *First Order*. As with other embedded CPE, the valuation of AT&T's embedded mobile CPE was set at adjusted net book value, and a sale and price predictability program was established. This detariffing plan was made effective retroactive to January 1, 1984. With regard to embedded mobile CPE owned by the ITCs and the RCCs, we determined that the position of these companies in this competitive market did not require any extended transition period before removing embedded mobile CPE from regulated service, and therefore, we required detariffing of this equipment as of January 1, 1985. We decided to extend to the state commissions the flexibility to establish valuation standards and detariffing mechanisms, such as sales plans, to be applied at the time these assets owned by the ITCs and RCCs were removed from regulated service.

21. Although we detariffed federally tariffed embedded mobile ITC-owned CPE in the *Second Order*, we did not specify the detariffing mechanisms or valuation methodology to be used. It is our understanding that this represents a small amount of CPE. In this Notice we seek comment on our proposal to utilize net book value plus transaction costs as the valuation mechanism for the detariffing of this equipment in a manner similar to that described herein for NSEP equipment, excluding the waiver provision.

2. Other CPE

22. In order to ensure that when we terminate this proceeding all new or embedded CPE has been detariffed,[50] we are seeking comment on the

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reconsideration, 89 FCC 2d 58 (1982), *modified on further reconsideration*, 90 FCC 2d 571 (1982), *appeal dismissed sub. nom. U.S. v. F.C.C.*, No. 82-1526 (D.C. Cir. January 17, 1983). Subsequently, a Notice of Proposed Rulemaking in CC Docket No. 83-372 addressed the deregulation of mobile CPE used in conventional common carrier mobile radio services. Deregulation of Mobile Customer Premises Equipment, Notice of Proposed Rulemaking, 48 Fed. Reg. 20,952 (1983) (hereinafter *Mobile Notice*). In the Order adopted pursuant to this notice, the Commission, consistent with the procedures established in the *Second Computer Inquiry*, deregulated and detariffed mobile telephone equipment on a bifurcated basis. Deregulation of Mobile Customer Premises Equipment, Report and Order, 48 Fed. Reg. 54,619 (1983)(hereinafter *Mobile Order*), *modified on reconsideration*, 49 Fed. Reg. 882 (1983). In a Further Notice of Proposed Rulemaking in this docket, 48 Fed. Reg. 54,668 (1983), we proposed procedures for deregulating embedded mobile CPE, and the *Second Order* was adopted pursuant to that notice.

[50] In the *Third Order*, the Commission indicated that states must detariff embedded CPE no later than December 31, 1987. The Commission, however, excluded from this requirement CPE that serves the disabled. States were given the option of deciding whether or not to detariff the specialized terminal equipment needed by persons whose hearing, speech, vision or mobility is impaired. *See id.*, para. 45 n. 35. We propose herein to provide the same type of option with respect to 911 emergency CPE owned by ITCs

deregulation of any remaining CPE we have not addressed in this or any previous notice and order.[51] We propose to deregulate any other embedded CPE in a manner similar to NSEP CPE, excluding the waiver provision for extending the period for deregulation.[52] Comments should address the type of CPE, the entity responsible for the CPE, valuation standard, transfer, date of deregulation and other significant issues involved in the proposed detariffing plan.

V. Initial Analysis and Certification Under the Regulatory Flexibility Act

23. This Notice proposes rules and policies for the detariffing of CPE owned by ITCs, tariffed at the federal or state level, and used by the Federal Government for NSEP functions. The objective of this proceeding is to establish a workable and durable framework for the provision of this CPE in a manner that accommodates national defense and emergency preparedness goals as well as the policies of the *Second Computer Inquiry*. This Notice also proposes a framework for the deregulation of

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and tariffed at the state level. The Common Carrier Bureau has previously concluded that the provision of 911 emergency service directly promotes the statutory objectives embodied in Section 1 of the Communications Act, 47 U.S.C. §151, of "promoting safety of life and property through the use of wire and radio communications." *See* Letter from the Chief, Common Carrier Bureau, to Alfred A. Green, AT&T (Dec. 30, 1982). *See* also *generally* Southwestern Bell Telephone Company, File No. ENF 84-44, Mimeo No. 1709 (released January 8, 1985). Because of the extraordinary requirements for service continuity, reliability and maintenance associated with 911 emergency calls, we propose to defer to the states the decision of whether and how to detariff new or embedded 911 emergency service. State action should not, however, unnecessarily restrain competition in the provision of 911 equipment. *See generally id.* at paras. 18-19. Our proposal governs the CPE located at 911 attendants' positions, including associated switches and processing database equipment used to implement centralized 911 dispatch services. It does not govern conventional telephone CPE that might be used to place or receive a 911 call.

[51] For example, in a recent letter to the Common Carrier Bureau, Waterway Communications Systems, Inc. once again requested that the Commission deregulate new CPE to be utilized in a maritime common carrier service licensed under Part 81 of the Commission's Rules, 47 C.F.R. §§81.913-15. Letter from Martin W. Bercovici to Chief, Common Carrier Bureau (March 1, 1985). In comments filed in response to the *Mobile Notice*, Waterway had argued that the proceeding in CC Docket No. 83-372 should include customer equipment used in conjunction with Part 81-licensed services, but the Commission rejected this position, noting that the *Mobile Notice* was "finely focused upon the sole issue of deregulating mobile telephone CPE [used in all services licensed under Part 22 of the Commission's Rules] and did not include deregulation of any other type of CPE." *Mobile Order* at para. 11. Therefore, we seek comments in the Notice regarding the deregulation of customer equipment used in conjunction with Part 81-licensed maritime common carrier services. We propose to deregulate any such new equipment as soon as possible, and embedded equipment, if any, would be detariffed pursuant to the schedule proposed herein. *See also supra* notes 5 and 16.

[52] *See supra* para. 13.

any remaining new or embedded CPE that is still being offered subject to tariffs. The authority for this proposed rulemaking proceeding is contained in Sections 4(i), 4(j), 201-205, 213, 218, 220, and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 201-205, 213, 218, 220, 403. We state our legal authority for taking action in this proceeding, and note that the policy objectives of the Regulatory Flexibility Act are also encompassed in Sections 2(b) and 203(a) of the Communications Act of 1934, the provisions of which are intended to relieve many small telephone companies from various reporting requirements established in the Communications Act.

24. We tentatively conclude that small business entities, as defined for purposes of the Regulatory Flexibility Act, 5 U.S.C. §§ 602-12, would be favorably affected by this proposed rulemaking. The proposals made in this Notice for NSEP and mobile CPE could affect some ITCs and RCCs. Our request for comment on other CPE may also affect AT&T-IS and the BOCs.

25. We hereby certify pursuant to 5 U.S.C. § 605(b) that the Regulatory Flexibility Act is not applicable to ITCs because they are monopolies in their own service areas.[53] The Act incorporates the definition of a "small business" in Section 3 of the Small Business Act as the definition of a "small entity." The latter definition excludes any business that is dominant in its field of operation. ITCs, even small ones, enjoy a dominant monopoly position in their local service area. This is the case regarding the ITCs because each of them is the dominant provider of telephone service within its service area. Moreover, the actions we are taking in this proceeding with respect to NSEP CPE are designed such that the interests of small telephone companies are protected. We note that, even though the Regulatory Flexibility act does not apply to ITCs, our proposal regarding the detariffing of CPE owned by those companies and tariffed at the federal or state level complies with the spirit of that statute because it will have the effect of reducing administrative burdens faced by small ITCs.

26. We tentatively conclude that our proposals will have a favorable impact on small RCCs directly affected by our actions. It is our view that any small business under the terms of the Regulatory Flexibility Act will be favorably affected because the removal of tariffs and other regulatory restrictions will enable those companies to contend with market forces, to meet the needs of their customers, to take advantage of technological developments affecting CPE, and to control and direct the operation and expansion of their CPE businesses in a more efficient manner. Moreover, as we noted in the *CPE Detariffing Order*, the Regulatory Flexibility Act was designed for the protection of small businesses that are directly

[53] *See Notice* at para. 88.

subject to administrative rules rather than businesses indirectly affected by the results that any rules will produce.[54]

27. With respect to any detariffing of CPE proposed for equipment owned by AT&T-IS or the BOCs, we conclude, as we found in the *CPE Detariffing Order*, that these companies are not small businesses for the purposes of the Regulatory Flexibility Act. We also conclude that there are no federal rules which would overlap, duplicate, or conflict with the action proposed in this Notice.

VI. Comment Filings; Ordering Clauses

28. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantial disposition of the matter is to be considered in a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever occurs earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding.

29. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation, and that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1231 of the Commission's Rules, 47 C.F.R. § 1.1231.

30. ACCORDINGLY, IT IS HEREBY ORDERED, That pursuant to sections 4(i), 4(j), 201-205, 213, 218, 220, and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 201-205, 213, 218, 220, 403, and pursuant to Section 553 of Title 5, United States Code, NOTICE IS HEREBY GIVEN of the proposed adoption of new or modified rules, in accordance with the discussion and delineation of issues in this Notice and on the basis of previous notices and filings in this proceeding.

31. IT IS FURTHER ORDERED, That all interested persons MAY FILE comments on the issues and proposals discussed in this Notice not

[54] *Id.*

later than August 9, 1985, and that replies may be filed not later than August 27, 1985. In accordance with the provisions of Section 1.419 of the Commission's Rules, 47 C.F.R. § 1.419, an original and five copies of all statements, briefs, comments, or replies shall be filed with the Federal Communications Commission, Washington, D.C. 20554, and all such filings will be available for public inspection in the Docket Reference Room at the Commission's Washington, D.C., offices. In reaching its decision, the Commission may consider information and ideas not contained in filings, provided that such information is reduced to writing and placed in the public file, and provided that the fact of the Commission's reliance on any such information or ideas is noted in the *Order.*

32. IT IS FURTHER ORDERED, That the Secretary shall cause this Notice of Proposed Rulemaking to be published in the Federal Register.

33. IT IS FURTHER ORDERED, That the Secretary shall cause a copy of this Notice of Proposed Rulemaking to be mailed to the Chief Counsel for Advocacy of the Small Business Administration.

34. IT IS FURTHER ORDERED, That the Secretary shall cause a copy of this Notice of Proposed Rulemaking to be provided to each state regulatory commission.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Comparative Case, New Criteria
Comparative Criteria
Comparative Hearing
Daytime Station
FM Station
Service, Best Practicable

Commission added a new attribute under the comparative hearing criterion of securing the best practicable service which would enhance the integration proposal of a daytime-only licensee applying for an FM channel in the same community.
—FM B/c Assignments
MM Docket No. 84-231

Application, Acceptance
Application, Filing
Application, Repetitious
FM Station
FM Station Application
Ownership Multiple, Factor in Applications

Commission announced procedures for accepting applications for the 689 new FM channel allotments and for opening up the FM Table of Allotments for new petitions.
—FM B/c Assignments
MM Docket No. 84-231

FCC 85-124

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments	MM Docket No. 84-231

SECOND REPORT AND ORDER

Adopted: March 14, 1985; Released: April 12, 1985

BY THE COMMISSION: CHAIRMAN FOWLER ISSUING A SEPARATE STATEMENT; COMMISSIONER RIVERA DISSENTING AND ISSUING A STATEMENT.

I. Introduction

1. Before the Commission for consideration are three matters not addressed in the *First Report and Order*, 50 Fed. Reg. 3514, published January 25, 1985, in this proceeding. The *Notice of Proposed Rule Making* (*"Notice"*), 49 Fed. Reg. 11214, published March 14, 1984, solicited comments on several proposals designed to aid daytime-only AM licensees in obtaining FM broadcast stations in their principal community of license. In response to the *Notice*, the Commission received in excess of 150 comments on these proposals.[1] Also in this document, we set forth the system by which we will begin to accept applications for the 689 recently allotted channels. Finally, we announce herein that new FM petitions to amend the FM Table of Allotments can now be filed.

II. Background

2. The National Telecommunications and Information Administration ("NTIA") in a 1981 petition for rule making proposed that the Commission seek ways to aid daytime-only AM licensees. Subsequently, the Commission issued the *Notice of Inquiry and Notice of Proposed Rule Making* in BC Docket No. 82-538, 47 Fed. Reg. 38937, published September 3, 1982. The Commission, therein, considered a broad range of problems faced by the daytime-only AM licensee. Included in the *Notice of Inquiry* portion of that proceeding was the proposal to grant a comparative preference to these licensees. While the *Notice of Inquiry* portion was pending, the Commission began the first steps towards implementation of Docket 80-90. The Commission proposed that many of the new FM allotments be placed in communities presently served exclusively by daytime-only AM licensees.

3. In addition, because of our continuing concern for the limitations of daytime-only operations and our recognition that many daytime-only licensees have a long history of outstanding service to their community of

[1] A "Petition for Bifurcation and Expedited Action" was also filed on behalf of the Gene Sudduth Company, Inc. ("Sudduth"). Various parties filed in support and in opposition to this petition. Sudduth requested that the Commission separate the question of a preference for daytime-only licensees from the proceeding implementing Docket 80-90 and consider it on an expedited basis. In addition, Sudduth argued that a preference should be granted to all daytime-only licensees and not solely to those in the omnibus proceeding. With respect to Sudduth's request that this matter be handled in an expedited manner, our action in this proceeding makes that portion of the petition moot. We have determined, however, that based on the comments filed, special consideration should be applied in all future FM comparative proceedings as noted in paragraph 20.

license, we believed it appropriate to inquire in this proceeding as to whether some form of aid should be granted the daytime-only licensee applying for an FM channel in its community of license. In particular, we requested specific comments on the type of aid that could be provided to the daytime-only licensee in the comparative process.[2]

III. Comments

4. The majority of the parties filed comments in support of granting some form of aid to daytime-only broadcasters. Although two forms of possible assistance were suggested, the majority of the comments focused on the desirability of granting a preference to daytime-only AM licensees.[3] The parties disagreed, however, as to the nature and the limitations which should be placed on such a preference.

5. In support of a preference for daytime-only AM licensees, commenters assert that often daytime-only licensees have been the only source of programming to serve the special needs of their respective communities. Specifically, they point out that residents of smaller communities must rely on their local daytime-only broadcaster for information about local weather conditions, school closings, government actions, and other items of local interest. Commenters argue that the daytime-only licensees have provided this information in spite of the service constraints associated with daytime-only operation. Citing imposed restrictions on hours and broadcast conditions, commenters assert that daytime-only licensees often cannot provide adequate service to their communities of license. Moreover, commenters point out that these same restrictions cut into station revenues by precluding stations from offering service during prime portions of the broadcast day, such as drive times.

6. Commenters argue that if the Commission does not grant a comparative preference to daytime-only licensees, this will have the unintended effect of eliminating the experienced broadcaster in favor of the untested new applicant. These commenters assert that with the introduction of a superior, full-time, FM facility the daytime-only station could be forced out of business. In this connection, commenters note that many of the smaller markets could be expected to have difficulty supporting additional broadcast outlets. Similarly, other commenters contend that the daytime-only licensee might be forced to choose between going out of business and selling his facilities to the new FM licensee, leaving the community with only one voice. Such a result, it is alleged, would be inequitable in light of the daytime-only licensee's history of

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[2] *See Policy Statement on Comparative Hearings*, 1 FCC 2d 393 (1965).

[3] Although some parties proposed that the preference also be awarded to full-time AM licensees, we do not believe that the same policy justifications would support such a preference.

service to the community and accompanying financial sacrifice. Consequently, it is asserted that there would be no net increase in diversity in the affected community if the new broadcaster wins in the comparative hearing.

7. While the majority of the parties suggested that the Commission grant a substantial preference, most have differing opinions as to its nature and limits. One group proposed that the value of the preference be similar to that which is given in the comparative hearing for 100% ownership integration. Other parties contend that it should be akin to the "renewal expectancy" granted incumbents in comparative renewal proceedings. Under this plan the daytime-only licensee would have to demonstrate that it had provided "substantial" service to its community of license in order to receive a preference.

8. Some commenters express their concerns that, if daytime-only licensees receive some form of preference, it could undercut the Commission's policy of increasing the number of minority broadcasters. These parties allege that grant of too great a preference could foreclose opportunities for minority broadcasters to obtain these new FM allotments in their communities. Specifically, the National Association of Black Owned Broadcasters, Inc. ("NABOB"), while generally supportive of a preference, suggests that the preference be weighted such that non-minority daytime-only licensees would not be preferred over minority applicants. Similarly, the National Black Media Coalition ("NBMC") contends that daytime-only licensees should not be granted preferred status for the new FM allotments which would otherwise have been granted to minorities.

9. Although the *Notice* stated that the proposed preference would only be available in the community of license, many commenters nonetheless suggested alternatives. These commenters suggested that a preference should be granted to daytime-only licensees even if the new FM allotment is not precisely in the same community as the daytime-only station. Specifically, the National Association of Broadcasters ("NAB"), Marion Broadcasting Company ("Marion") and Wilson-Howard-Broyles Broadcasting ("WHB") propose that the Commission grant a preference to daytime-only licensees whenever the 1 mV/m contour of the existing daytime-only station and the proposed new FM station would overlap. Likewise, the Daytime Broadcasters Association ("DBA") contends that whenever the FM station would substantially overlap the service area of the existing daytime-only facility, the daytime-only licensee should be awarded a preference.

10. Those parties supporting a preference are also divided as to whether divestiture should be a prerequisite. Commenters opposed to a divestiture requirement argue that the public interest could best be

served through allowance of the AM-FM combinations. NAB asserts that the Commission has in the past acknowledged the benefits to be derived from such combinations. Other commenters note that the Commission has recently determined that existing licensees might acquire new facilities in their community of license without a divestiture requirement.[4] DBA points out that the Commission has declined to consider a proposal that AM-FM combinations be broken-up. Accordingly, these parties assert that requiring divestiture in this proceeding would be inconsistent with the Commission's prior pronouncements and discriminatory to daytime-only licensees.

11. Opponents of a divestiture requirement further contend that many smaller markets can support only one broadcast facility. In such markets, commenters argue that the introduction of a superior full-time FM station could soon lead to the financial demise of the daytime-only station. When the daytime-only licensee attempts to sell the station in a community with a superior FM station, commenters contend that the daytime-only licensee could be forced into a "distress sale" posture. Instead of requiring divestiture and eventually losing an experienced daytime-only licensee, these commenters suggest that the Commission consider the benefits to be derived from joint ownership. In those communities that are too small to support two facilities, commenters indicate that an AM-FM combination could share certain resources, such as studio facilities and staff. Commenters point out that this in turn would result in the availability of additional resources which could be devoted to programming to serve the needs of their communities. Moreover, commenters contend that in the smaller communities the revenues generated from the existing daytime-only station could be used to cover the start-up costs of the new FM station and to support the FM facility during its initial operating period.

12. The commenters supporting a divestiture requirement point out that, under existing Commission policy, a daytime-only licensee can avoid a diversity demerit in the comparative hearing by pledging to divest its AM daytime-only facility.[5] Because divestiture of the daytime-only facility would not represent a significant change in Commission policy, these commenters are not opposed to such a prerequisite. Moreover, these parties suggest that divestiture would assure that the Commission's policy towards media diversity would not be thwarted by having the same licensee owning both an AM and FM facility.

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[4] *Citing Multiple Ownership of AM and FM Stations*, 51 RR 2d 449 (1982).

[5] *See Alexander S. Klein, Jr.*, 49 RR 2d 606 (1981).

IV. Discussion

A. Comparative Merit for Daytimers

13. After careful consideration of the record in this proceeding, we conclude that it is in the public interest to afford some form of special consideration to daytime-only licensees when they apply for FM allotments in their community of license. This conclusion is based on several factors. First, daytimers represent a unique class of broadcast licensees. They alone are restricted to operate essentially from sunrise to sunset. Thus, daytimers and their respective communities do not receive the benefit of nighttime operations from daytime-only stations. In addition, daytime-only stations cannot take advantage of potential nighttime revenue to support their operations. Further, although the Commission has a strong policy to improve the ability of these licensees to obtain expanded service, the requirements of other types of AM stations, *e.g.* Class I and III stations, place a technical limit on the amount of relief that can be provided. We believe that the operation of daytime-only stations in the public interest by licensees, despite the above limitations, provides a strong indication that they will operate an FM station in the same community in a manner that will further the public interest. Moreover, positive recognition of the efforts of these licensees in operating limited facilities encourages all licensees to maximize the provision of service to the public, notwithstanding the nature of any obstacles attendant to such operations.

14. As many commenters noted, it was often daytime-only licensees who pioneered radio broadcast service in their communities. However, these licensees have always been subject to the limitation that they cannot operate at night. In a number of communities this limitation has deprived the community of any local nighttime service. It also follows that because daytime-only stations essentially are restricted to daytime hours of operation, the facilities must be supported without the aid of a nighttime revenue base. No other type of AM station is limited in this manner. Furthermore, many daytime-only stations are still unable to reap the full economic benefits that could be derived from operating during peak broadcast hours of high listenership, *e.g.* evening "drive-time" (4:00 p.m. to 6:00 p.m.) during the months of December and January when Christmas and New Year's advertising revenue is critical. Some of these licensees are required to sign-off as early as 4:15 or 4:30 p.m. during these months, while others are limited to post-sunset operation with powers significantly less than their authorized daytime power levels.

15. In recognition of the above problems, the Commission initiated a rule making proceeding in September of 1982 to explore various alternatives for expanding the capability of daytime-only stations to operate

beyond their present limitations.[6] A *Report and Order* was issued in September of 1983 permitting greater pre-sunrise flexibility and authorizing, for the first time, post-sunset operations.[7] In April of 1984, we released a *Memorandum Opinion and Order*,[8] on reconsideration, which, *inter alia*, gave further post sunset relief to daytime-only stations operating on foreign clear channels. Finally, in December of 1984, we resolved the issue of affording additional post-sunset relief to daytime-only stations operating on regional channels.[9] These actions reflect our high degree of sensitivity to the predicament faced by daytime-only licensees in attempting to expand service to their communities.[10] However, at best, our actions afforded only moderate assistance to these licensees. In this regard, it was apparent that additional technical relief could be provided only at the risk of creating significant interference to the service requirements of other types of AM stations, such as Class I and III stations.

16. In view of all of the foregoing, it appears that the most viable option for addressing our concerns in this area is to grant special consideration to daytime-only licensees when they apply for new FM stations in their community of license. The comparative hearing process is the desirable vehicle for accomplishing this objective. Before discussing the methodology for applying any special comparative consideration to the subject licensees, we will briefly review the existing comparative hearing standards.

17. The Commission's 1965 *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965), sets forth the criteria for choosing among qualified new applicants for the same broadcast facility. These criteria include: (1) diversification of control of the media of mass communications; (2) full-time participation in station operation by owners (also characterized as securing the best practicable service); (3) proposed program service; (4) past broadcast record; (5) efficient use of the frequency; (6) other factors. [11] *Id.* at 394-399. The two primary criteria in comparative hearings are diversification and securing the best practicable service. *Id.* at 394.

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[6] *Notice of Proposed Rule Making and Notice of Inquiry,* 47 Fed. Reg. 38937 (1982).

[7] 48 Fed. Reg. 42944 (1983).

[8] 49 Fed. Reg. 17942 (1984).

[9] 49 Fed. Reg. 48046 (1984).

[10] It is also noted that a number of recent Congressional initiatives have focused on this matter. *See for example,* S.880, 98th Cong., 1st Sess., (1983), S. Rep. No. 98-165, 98th Cong., 1st Sess. (1983); H.R. 1589, 98th Cong., 1st Sess., (1983); H.R. 2385, 98th Cong., 1st Sess., (1983); H.R. 6129, 97th Cong., 2nd Sess., (1982); and H.R. 6306, 97th Cong. 2nd Sess., (1982).

[11] "Other factors" can include examination of additional relevant and substantial matters. *Id.* at 399.

18. Diversification is a comparative factor which involves a consideration of common control and less than controlling interests in other broadcast stations. Diversification is considered to be of primary significance and can lead to a predominant comparative preference or demerit. The ultimate weight given to this factor depends on the degree of ownership interest in other stations or media and the proximity of other stations or media to the community of the proposed station. *Id.* at 394-395.

19. The second comparative criterion, securing the best practicable service, is a factor of substantial importance and can lead to a significant preference depending on the extent to which there is full-time participation in station operations by owners. Moreover, the value of a preference for integration of ownership and management can be enhanced by attributes of the participating owners such as local residence, past participation in civic affairs, previous broadcast experience and minority ownership.[12] The rationale for allowing these attributes to enhance an integration proposal is that they increase the likelihood of securing the best practicable service. For example, "participation in station affairs . . . by a local resident indicates a likelihood of continuing knowledge of changing local interests and needs." *Id.* at 396.

20. We believe that affording comparative credit to daytime-only licensees who apply for new FM channels in their community of license also increases the likelihood of securing the best practicable service. As indicated previously, daytimers have operated their facilities in the public interest in an environment with serious limitations (see paragraphs 14-15 above). Thus, we believe there is an especially strong likelihood that they will operate a full-time FM facility in the same community in a manner which furthers the public interest. Moreover, awarding special comparative consideration to daytimers serves as an incentive to licensees in general that operation of facilities in the public interest, notwithstanding the difficulties encountered, can lead to certain added benefits. In view of the foregoing, we have decided to consider prior daytime ownership/management experience in an upgraded manner under the general comparative criterion of securing the best practicable service. Specifically, where the broadcast experience of an applicant is based on previous substantial participation in management of a daytime-only station owned by the applicant in the same community as the proposed FM station, we shall upgrade the value of broadcast experience as an integration enhancement so that it will be equal to the enhancement value of local residence or minority ownership. Where the applicant's broadcast experience does not meet these requirements, the comparative weight to be

[12] Equal weight is given to local residence and minority ownership. Past participation in civic affairs and broadcast experience are accorded less weight than either local residence or minority ownership. *See Radio Jonesboro, Inc.*, FCC 95305.

given broadcast experience will be less than local residence or minority ownership as indicated in note 12, *supra.* This new policy shall apply to all future comparative proceedings involving new FM applications filed, but not yet designated for hearing, as of the effective date of this order.[13]

21. However, to receive any such additional credit, the daytime-only licensee/applicant must have owned the daytime-only station for three continuous years prior to designation of the FM application for hearing. The applicant also must propose to be integrated in the operation of the FM station.[14] In addition, the application must be for an FM channel in the same community as the daytime-only station's community of license. These conditions are designed to assure that the benefits relied on in giving special consideration to daytime-only licensees are realized.

22. Having determined that daytime-only ownership/broadcast experience should be entitled to comparative enhancement, we next address whether divestiture of the daytime-only station in the same community as the proposed FM station should be required. Based on our review of the record, Commission policy, case precedent and our continuing concern in the area of media diversity, we are persuaded that daytimers, who choose to take advantage of the upgraded comparative credit for daytime-only ownership/broadcast experience, should be required to divest themselves of the daytime-only station. Absent a divestiture requirement, daytimers would receive a double benefit and the public would be deprived of an opportunity to add another diverse voice to the community. We do not believe that such a result would best further the public interest.[15]

23. Given the above, a daytimer seeking additional comparative credit must pledge to divest itself of the daytime-only station within three years from the commencement date of program test authorization for the new

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[13] We believe that this represents an appropriate cut-off point. Applicants participating in a hearing, or post-hearing process, as of the effective date of this order, have expended significant time and funds in reliance on the existing comparative standards. Moreover, reopening these hearing proceedings would impose significant administrative costs on the Commission and delay service to the public. Therefore, in this particular circumstance, we will exercise our broad discretionary powers and limit application of the new policy as indicated above.

[14] As is the case with all current integration enhancement credits, the extent to which an applicant must be integrated before receiving upgraded broadcast experience credit will be determined by existing integration standards as enunciated in the *Comparative Policy Statement,* 1 FCC 2d at 395-396, and pertinent cases subsequent thereto.

[15] We recognize the position of some of the commenting parties that divestiture appears to be inconsistent with our recent action which declined to proscribe AM/FM combinations. *Multiple Ownership of AM/FM Stations,* 51 RR 2d 449 (1982). Yet, in that proceeding, we clearly indicated that a non-licensee who filed a mutually-exclusive application for an FM station against an existing AM licensee would have an advantage under the diversification criterion of the standard comparative issue. *Id.* at 551. Our action herein requiring divestiture is thus fully consistent with our 1982 AM/FM decision.

FM station. This divestiture pledge must be made by the daytimer within 30 days after designation of its FM application for hearing.[16] If an applicant fails to make the required divestiture pledge, it will receive no special credit[17] for broadcast experience obtained while owning a daytime-only station.[18]

B. Application Process

24. In the *Notice of Proposed Rule Making,* we proposed to "phase-in" new FM stations by "staggering" the effective dates of the new channel allotments. Therein, we stated "[t]he order of availability could be based on any of several factors including: (1) geographic region, by states; (2) alphabetical, by communities; (3) largest communities, by population; (4) channel number (221-300)."

25. Comments received in response to the "staggered" approach were varied. A majority expressed a preference for any of a number of random procedures for accepting applications. Fewer than half recommended that we employ a system of priorities based on the community's need for new or additional service.

26. In determining a reasonable process by which applications will be accepted for the new channels, we considered two overriding factors. First, the procedure ultimately must provide an equitable and orderly method for the filing of applications by interested parties. Second, the procedure must provide an orderly method for the processing of applications by the Commission staff. We are satisfied that a process of accepting applications by random selection of channel number will accomplish these ends. Such a scheme will ensure that all communities, states, and geographic regions of the country in which new channels have been allocated will receive fair and equal treatment. Such a procedure will also allow the Commission staff to manage the flow of applications as the new channels become available for filing.

27. In a separate action today, we are adopting new rules regarding filing procedures. *See Report and Order,* MM Docket 84-750. By this action, we will apply those rules to the allotments made in the *First*

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[16] Any daytimer who makes such a pledge will not be assessed a diversification demerit for owning the daytime-only station.

[17] Failure to pledge divestiture will thus mean that the applicant's broadcast experience will be less in weight than the local residence or minority ownership comparative factors.

[18] If a daytimer fails to qualify for upgraded broadcast experience credit because it does not meet the criteria in paragraphs 20-23, above, it still can pledge to divest itself of the daytime-only station and avoid a diversification demerit for that station. In fact, Commission policy permitted such actions prior to initiation of this proceeding. However, in those situations, divestiture was required to be made prior to the grant of program test authority for the new station. Henceforth, *all* daytimers, who pledge, or have already pledged, to divest a daytime-only station, will have three years from the grant of program test authority to carry out such divestiture.

Report and Order, supra in this proceeding. The Commission will *randomly* assign to each of the 80 commercial FM channels (221-300) a corresponding number (1-80) representing the order in which applications for each channel will be accepted for filing. These channels will not become effective and applications for them will not be accepted prior to the applicable pre-announced "window" period for each channel. In the near future, the Commission will issue a public notice announcing the date on which we will conduct a random selection to determine the order in which applications for each channel will be accepted for filing. Subsequently, we will issue a public notice identifying the specific order in which we well accept such applications.

28. We may, during the course of implementing the allotments made available in the *First Report and Order,* Docket 84-231, further amend Section 73.202(b) of the Commission's Rules, the FM Table of Allotments, to add additional channels through appropriate rule making proceedings. Such new allotments will become available for application as they are made, also utilizing the "window" procedure.

29. Mutually exclusive applications will be designated for a comparative hearing. If, at a later date, we decide to revise the nature of the hearing due to changed circumstances, appropriate notice will accompany announcements of filing "windows" indicating to applicants when they file the nature of the selection process to which they will be subjected. However, when it is announced that applications for a particular community are to be received and processed through a comparative process we will not alter that procedure for that community in "mid-stream."

C. Multiple Applications

30. The law firm of Haley, Bader & Potts, filed a request to clarify the terms under which applicants will be permitted to file multiple applications for new FM facilities. The law firm of Lukas, O'Brien & Raiser, Chartered, filed supporting comments. The issue arises from the provision of Section 73.3555(d) of the Commission's Rules which generally restricts a party from holding a cognizable interest in more than twelve FM stations.[19]

31. Section 73.3518 of the Commission's Rules proscribes the filing of inconsistent or conflicting applications by, or on behalf of, or for the benefit of the same applicant. We have heretofore stated that "Section

[19] *See Report and Order* in Gen. Docket No. 83-1009, FCC 84-350 (released August 3, 1984), *appeal docketed sub. nom. Black Citizens for a Fair Media v. FCC,* No. 84-1503 (D.C. Cir. filed Oct. 9, 1984). In the *Memorandum Opinion and Order* in Gen. Docket No. 83-1009, FCC 84-638 (released February 1, 1985), the Commission on reconsideration determined that group owners could own up to a maximum of fourteen FM stations provided, however, that no more than twelve stations are controlled by persons which are not members of a minority group.

73.3518 was promulgated because of concern that processing and hearing applications which cannot all be granted because of the limits of the multiple ownership rules may waste the Commission's resources, unfairly prejudice other applicants, and delay service to the public." *William H. Hernstadt,* 56 RR 2d 948, 949 (1984). We believe the policy underlying Section 73.3518, as applied in *Storer Broadcasting Co.,* 43 FCC 1254 (1953), and *D.H. Overmyer Communications Co.,* 45 FCC 2272 (1965), is sound. That is, applicants should not be permitted to "flood the Commission's processing line and hearing docket with multiple applications many of which could not be granted under our multiple ownership rules. Such multiple applications, if entitled to consideration, would delay the processing of applications which would otherwise be granted." *Storer Broadcasting Co. supra,* at 1256.

32. Accordingly, we shall regard Section 73.3555(d) as establishing the maximum number of applications acceptable for filing by an applicant. Any application tendered in excess of this limit shall be considered inconsistent with Section 73.3518 and returned as unacceptable for filing. In this regard, we note that stations in which the applicant currently holds a cognizable ownership interest would be taken into account in determining the maximum number of acceptable applications. Our decision in this regard "is essential from the point of view of the just administration of broadcast applications and fairness to all other applicants seeking the establishment of broadcast services. . . ." *Id.*

33. Finally, the Commission anticipates the possibility that a large number of applications may be filed in response to this omnibus rule making. Thus, in order to expedite the processing of applications, the Commission strongly encourages applicants who are required to file FAA Form 7460-1[20] with the Federal Aviation Administration to do so at the earliest available time.

D. Acceptance of New FM Petitions

34. The Commission announced by Public Notice of December 9, 1983 that it would not accept petitions for new FM channel allotments during the pendency of this proceeding. With this *Second Report and Order* we shall open up the FM Table of Allotments for amendment. New petitions shall have no restriction as to a category of need or other such limitation as had been applied in this docket. As previously required, the petition must contain a technical study demonstrating compliance with the

[20] Notice of Proposed Construction or Alteration.

minimum spacing requirements.[21] *See* Section 1.401 et. seq. of the Commission's Rules for other filing requirements.

35. IT IS ORDERED, That the Secretary SHALL CAUSE this *Report and Order* to be printed in the FCC Reports.

36. IT IS FURTHER ORDERED, That this action is effective May 20, 1985.

37. Authority for this action is contained in Sections 4(i), 303(g) and (r) of the Communications Act of 1934, as amended.

38. For further information call Robert E. Branson (Legal Branch) (202) 632-7792 on the matter of daytime stations or Gary Schonman (FM Branch) (202) 632-8755 on the filing of applications.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

March 14, 1985

STATEMENT OF CHAIRMAN MARK S. FOWLER

RE: Implementation of Docket 80-90

Today we are taking a major step forward in providing more choice for the American public — making this country more "radio active", in the best sense of those words. When this proceeding began, there were some who felt that the FCC could not arrive at a sound way to engineer in these additional stations.

Once the process for adding stations to the table of allocations was made, we faced the difficult task of deciding what criteria to apply in the comparative process. The choices that confront policy makers in 1985 differ considerably from those before the agency in 1935 or even 1965. Today's decision is our best effort to accommodate the criteria that seem to us most important and relevant in the licensing of stations.

I believe that when all the comparative hearings are over, we will see a leap in the number of minority owned FM facilities. And we have allowed AM daytimers to compete and upgrade their positions in their markets — a sort of "Make My Daytimers" weighting process. Minorities and daytimers are both significant groups to consider in the licensing process, and I think we have sensibly blended these interests in developing the criteria for the comparative process.

But the real purpose of today's order is not to benefit any class of potential licensees or to discourage anyone from applying. The business at

[21] The technical study should be based on the rule amendments made in Docket 80-90 as to distance separations including a 16 kilometer buffer for Class C stations below minimum facilities which is in effect until March 1, 1987.

hand is the public's interest in program choice and diversity. And on that measure, Docket 80-90 gets a score of 100.

DISSENTING STATEMENT OF COMMISSIONER HENRY M. RIVERA

RE: Second Report and Order in Docket 84-231 (Daytimer Preferences for New FM Broadcast Stations)

Introduction

The fundamental reason for creating new FM stations in Docket 80-90 was to enhance diversity and competition in broadcasting.[1] These goals are rooted in the belief that the public is best served by the broadcast industry when there are many outlets for expression and many competing voices. This decision confers significant new comparative advantages on a large segment of the established broadcast industry — locally owned daytime AM stations — in the licensing of new FM stations. By doing so, the majority directly undermines the goals of diversity and competition. Under the policies adopted here, a substantial number of new FM outlets will be awarded to daytimers who will be entitled to keep their AM stations for years after they receive their new FM license. I am sensitive to the plight of the daytimer. However, because I find no rational basis for the majority's new policy of broad and general favoritism toward daytimers, I dissent from the *Second Report and Order* in this proceeding.

Analytic Flaws

The majority reasons that daytimers are uniquely deserving of a comparative enhancement because they operate under technical and financial handicaps; despite these handicaps, they have operated in the public interest. This past performance, the majority postulates, gives a strong indication that daytimers will operate their new FM station in the public interest just as they have operated their AM station. Granting daytimers a comparative enhancement by "upgrading" the value of their prior broadcast experience will it's asserted, encourage all licensees to provide the best practicable service.[2]

This reasoning is flawed on several counts. Undeniably, daytimers labor under technical constraints; consequently, many are not as successful financially as they could be with unlimited time facilities. What the majority seems to ignore is that these licensees have voluntarily opted for

[1] *See FM Broadcast Stations*, 94 FCC 2d 152 (1982).

[2] *See Second Report and Order* paras. 13-16.

these stations and have had exclusive use and benefit of the spectrum during their licensed tenure. Furthermore, daytimers are not the only broadcasters who labor under technical or financial handicaps. A variety of licensees have facilities with comparable limitations. Class 4 FM stations, for example, operate at wattage often a fraction of a daytimer's regular authorized power. The coverage area of low power television licensees pales in comparison to that of full power television stations. Yet, no one argues that these other licensees should be entitled to preferences for new FM stations based on their status as broadcasters. Thus, unless the majority contemplates an across-the-board preference comparative hearings for all incumbent broadcasters with technical constraints, it is arbitrary to grant a preference only to daytimers on this basis.

The majority's reasoning is flawed for other reasons, as well. The majority has concluded that because daytimers, as a class, have served the public interest they should have a preference in comparative hearings. But, serving the public interest is something the Communications Act calls for as a *quid pro quo* for use of the spectrum. Therefore, daytimers are no more deserving of special treatment on this ground than any other broadcaster, unless it is shown that daytimers' conduct is somehow superior to that of other broadcasters. There is no record evidence cited to support such a finding. Assuming *arguendo* that this generic finding can be supported empirically, however, the benefit the majority has conferred on daytimers extends far beyond what the courts have previously approved for incumbent broadcasters. Preferences for incumbency — which is, in effect, what the new enhancement is — have previously been restricted to the comparative renewal context, where a licensee's right to continued use of the spectrum is being challenged by another. Even then, an incumbency preference is only permissible if the licensee makes a detailed showing that it has rendered substantial public service.[3] And, the court has admonished that the renewal expectancy is "for the benefit of the public, not incumbent broadcasters."[4]

In the situation before us, what is at stake is not comparable to what is at stake in a comparative renewal hearing — a broadcaster's reasonable expectation of renewal and the public's interest in substantial service — but, rather, the terms under which an established broadcaster can compete for a *new* station.[5] Nevertheless, the majority grants an

[3] The court has accepted the premise that incumbents can be preferred in comparative renewal hearings in order to provide a competitive spur to licensees and to promote industry stability. *Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503, 507-08 (D.C. Cir. 1982).

[4] *Id.*

[5] Because of the way in which the "divestiture" requirement is structured, *i.e.*, a daytime station may be held for three years after program test authority for the FM facility has been granted, these licensees can be said to be applying for a *second* station.

automatic enhancement based on its generic and unverified assumption that daytimers have operated in the public interest.

New Entrants

Aside from these analytic flaws, the new enhancement is most disturbing because it will effectively foreclose many new entrants from receiving FM authorizations. A primary reason we created these new FM stations was to provide new opportunities for entry into broadcasting. With this new daytimer enhancement, it will be almost impossible for any newcomer — minority or non-minority — to prevail against a qualifying daytimer. This is because daytimers who qualify for the new enhancement — and that will number in the hundreds[6] — will also be entitled to a significant enhancement for local residence.[7] In combination, these two advantages will be unbeatable by almost any other applicant. This "wired" result flies in the face of prior policy, which gave almost no advantage to industry players for past broadcast experience in comparative broadcast hearings. Broadcast experience confers only an initial advantage, *i.e.* it can be quickly acquired by a newcomer on the job. More importantly, the Commission has recognized that an emphasis on experience could discourage qualified newcomers from broadcasting and, thus, discourage diversification of the mass media.[8] Less diversification is precisely the result this decision will achieve.

Furthermore, the new daytimer enhancement will be especially disastrous in the "minority need" communities. These cities, which represent approximately 25 percent of the allocations contained in this omnibus proceeding, were added by this Commission to the Table of Assignments because they have large minority populations and few or no minority owned stations.[9] Now, because of this policy change, minority applicants will find it nearly impossible to win licenses in these cities — that's

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[6] According to FCC data, there are approximately 2,554 daytime only AM licensees. An estimated 50 percent of these licensees own AM-FM combinations. Therefore, it does not seem unreasonable to posit that several hundred daytimers could benefit from the policies adopted herein, especially since the policy applies to *all* licensing cases, not just to channels created by Docket 80-90.

[7] In order to receive a daytimer preference, a licensee must have managed an AM daytime station in its community for at least three years and propose to work at the new FM station. These ties with community by an integrated owner would also entitle the applicant for local residence enhancement.

[8] *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394-5 (1965).

[9] *See* Notice of Proposed Rulemaking in Docket 84-231 (Docket 80-90 Implementation), FCC 84-66, 49 Fed. Reg. 11214, at para. 508 and n. 5 (released March 14, 1984). While I have no objection to using this need concept as an allocation device, it has no place in the application of the minority ownership incentive in comparative cases. *See West Michigan Broadcasting, Co.* v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert, denied*, 105 S. Ct. 1392 (1985) (rejecting argument that credit for minority ownership can only be granted in comparative cases if the community of license has a significant minority population).

because most (70 percent) have one or more daytimers who could be eligible for the new enhancement.[10] Had the daytimer enhancement been applied rationally — for example, to communities in which a daytimer is the only licensee[11] — there would have been little, if any, adverse impact upon these "minority need" cities.[12]

Local Cross Ownership Rules

I likewise cannot support the "divestiture" plan adopted by the majority. Under this plan, daytimers may avoid a "diversity demerit" in the FM comparative hearing if they pledge to sell their AM stations within three years of receiving program test authority for the new FM facility. This result, is, at best, a token effort to remain faithful to the letter of our diversification policy[13]. The spirit of that policy is severely compromised, however, because the majority condones the *creation* of numerous new

[10] According to FCC data, approximately 170 allocations were added to the FM Table of Assignments on this basis. An estimated 130 of these communities have daytime AM licensees who could be eligible for the new preference policies.

[11] If any equities can be said to accrue to daytimers *per se* in alloting new FM stations, it might be to those daytimers who are the only outlets licensed to their communities, especially in outlying areas. Such licensees have not only functioned under restricted hours and limited income, but have provided the only local service, often when no one else was willing to do so. The added competition posed by the new FM stations we have authorized could theoretically extinguish daytimers in these situations. Under existing precedent, licensees would have to dispose of their stations to avoid a "diversity demerit" but, as a practical matter, might be unable to do so. They would, therefore, be faced with the prospect of going out of business or selling their facilities to the new FM licensees in the market. In these circumstances, it does not seem wholly unreasonable to temper the public policy favoring new entrants to give these licensees some advantage for a newly available fulltime FM facility — *in recognition of the fact that they have benefitted the public by providing its only local service.*

[12] According to staff estimates, of all the cities targetted as needing minority-owned or oriented service, only one is a single outlet community. In addition, the fact that daytimers are present in "only" forty percent of the 689 communities initially eligible for FM drop-ins does not diminish my concern. Most of the remaining 60 percent are in remote areas having negligible minority populations. It would be virtually impossible under FCC comparative broadcast policy for non-local minority applicants to win a license in these communities if local residents were interested in doing so. *See Radio Jonesboro,* FCC 85-74, (released April 5, 1985).

[13] Under the 1965 *Policy Statement, supra,* diversification of local mass media ownership and control is a factor of major significance. 1 FCC 2d at 394-5. Under existing policy, a licensee seeking to acquire a new facility can avoid the substantial demerit that he would receive by pledging to divest that facility. Congress has endorsed this policy against local cross-ownership. *See* H.R. Rep. No. 97-765, Conference Report, 97th Cong. 2d Sess. 43 (Aug. 19, 1982) (the avoidance of local ownership concentration should continue to be a factor of major significance in promoting diversity in the licensing process). *See also* Cable Communications Policy Act of 1984, P.L. 98-549 S. 1 *et seg.* 98 Stat. 2779 (1984), Section 613 (local cable-broadcast cross-ownership ban).

AM-FM combinations which will be allowed to exist for several years.[14] It is one thing to provide a reasonable period for divestiture of combinations that predate a new ownership restriction[15]; it is quite another to encourage the wholesale formation of *new* combinations contrary to established diversification policy — regardless of whether they must be separated at some far distant future time. In view of this Commission's reluctance to order divestiture in other contexts[16], it remains to be seen how strictly this new "divestiture" rule will be applied once these combinations come into being.

Conclusion

In its continuing effort to ameliorate the condition of this country's many daytime-only licensees, the Commission has strayed far afield from the public interest. Rather than targetting the daytimer preference narrowly to those licensees who can be said to have rendered a unique public service warranting compensation outside the renewal setting,[17] my colleagues have created a class of beneficiaries which could number in the hundreds.[18] This move is flatly contradictory to the free market, survival-of-the-fittest philosophy the majority so frequently espouses.[19] By entitling a large segment of the broadcast establishment to an almost unbeatable preference for new facilities, the majority will stymie the efforts of newcomers to enter the radio industry. Necessarily, those deprived by this rigging of the hearing contest will include minorities, whose participation in broadcasting the FCC previously encouraged. The new daytimer preference, premised as it is on such faulty logic, can only be seen as a blatant effort to neutralize whatever small progress has been attained by inclusion of a minority ownership incentive in the comparative hearing process. The majority has further compromised the diversity principle by an unduly permissive divestiture requirement. These sweeping and unjustified departures from established policy are premised on poorly defined equities said to run to all daytimers. I believe that the

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[14] Under the terms of this decision, a licensee may hold the AM-FM combination for close to *five years* after winning the FM facility (a permittee has 18 months to build a station and three years after program test authority to divest the AM station as promised).

[15] *See e.g., Third Report and Order in Docket 20423*, 56 RR 2d 87 (1984) (grandfathering "non-egregious" cable-broadcast television cross interests and deferring action on cases determined to be egregious in 1970s).

[16] *See id.*

[17] *See* note 12 *supra*.

[18] See *supra* note *7*.

[19] *Compare Random Selection of Radio Licensees*, 93 FCC 2d 952, (1983) (Statement of Chairman Fowler questioning congressional preference scheme); *Multiple Ownership of Broadcast Stations*, Docket No. 83-1009, FCC 84-638, 100 FCC 2d 74 (released Feb. 1, 1985) (Statements of Commissioners Patrick and Dawson questioning use of preferences in broadcast licensing).

equities lie not with those who are owners of broadcast facilities but, rather, with those who seek to become owners. Accordingly, I dissent.

Contour Overlap

Conflicts in measurements made to establish signal contours are to be resolved by averaging all properly taken and presented measurements.

—*GSM Media Corporation*
BC Docket No. 81-606

FCC 85-448

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of	
GSM Media Corporation Ontario, Ohio	BC Docket No. 81-606 File No. BP-20,202
For Construction Permit	

Memorandum Opinion And Order

Adopted: August 5, 1985; Released: August 13, 1985

BY THE COMMISSION:

1. This proceeding involves the application of GSM Media Corporation (GSM), for a construction permit for a new AM radio station at Ontario, Ohio. In a Decision, 94 FCC 2d 1168 (1983), the Review Board found that the 0.5 mV/m contour of GSM's proposed station would receive interference (overlap) from the 0.025 mV/m contour of station WPGW, Portland, Indiana.[1] In a Memorandum Opinion and Order, FCC 84-550, released November 23, 1984, the Commission affirmed the dismissal of GSM's application. Now under consideration are a Petition for Reconsideration filed December 26, 1984, by GSM; and Oppositions filed January 8, 1985, by Greater Mansfield Broadcasting Company (GMBC), and January 9,

[1] Station WPGW is located 128.2 miles from GSM's proposed site. If the distance from WPGW's transmitter to its 0.025 mV/m contour, in the direction of GSM's proposed site, when added to the distance of GSM's proposed 0.5 mV/m contour, exceeds 128.2 miles, there is a prohibited overlap resulting in interference within GSM's normally protected contour under Section 73.37(a) of the Rules, which would require the denial of GSM's application.

1985, by the Mass Media Bureau; and a Reply filed January 22, 1985, by GSM. GSM, in its Petition for Reconsideration, argues, *inter alia,* that the November 23, 1984, Memorandum Opinion and Order, employed a flawed methodology in determining that there would be a prohibited overlap, and that if the Commission were to employ an appropriate method for determining the service contours, there would be a finding of no overlap.

2. In *United Broadcasting Co., Inc.,* 1 FCC 2d 555, 559 (1965), the Commission held "when measurements are made at different periods and the conductivity therefrom shows variations due to climatic or seasonal conditions, that the average conductivity . . . must be determined by combining and analyzing all the data." The Commission said that not assessing all the data could result in determining signal contours on a seasonal basis. The November 23, 1984, Memorandum Opinion and Order, computed WPGW's 0.025 mV/m contour using measurements made by GMBC in January, 1977 and July, 1978, and the joint measurements made during May-June, 1983. The Memorandum Opinion and Order reasoned that an unweighted average combining all of the data would result in a warm weather bias. The data for July, 1978 and May-June, 1983, were averaged and the result was averaged with the January, 1977 data.

3. GSM argues, *inter alia,* that the separate averaging of warm and cold weather measurements cannot be justified on engineering grounds. Upon further consideration of this matter we agree. For the frequency band in question and for any given location, variations in conductivity are predominately the result of variations in soil moisture content, and observable propagation differences are traceable to differences in precipitation as opposed to variations in temperature. *Report 119-3 of the International Radio Consultation Committee,* (C.C.I.R.) (Kyoto, 1978). By making a separate average of the May-June and July data, a bias was injected into the calculations. Absent evidence that a majority of the measurements were made during periods of excessive moisture or an unusual drought, a bias can be best avoided by giving equal consideration to all data which was properly taken and presented.[2] We will, therefore, modify the November 23, 1984 Memorandum Opinion and Order, to give equal weight to each set of measurements.[3]

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[2] GSM submitted precipitation data for all the measurements under consideration affirmatively establishing the absence of any bias which would require the exclusion or granting of extra weight to any set of measurement data.

[3] We will, however, give no credit to GSM's July, 1978 measurements which were withdrawn, and GSM's December, 1975 measurements of its 0.5 mV/m contour and WPGW's 0.025 mV/m contour because those measurements were not validly taken and presented. GSM's arguments considering the validity of those measurements were considered and resolved in the Board's Decision and the November 23, 1984 Memorandum Opinion and Order. Those arguments are not entitled to further attention because the Commission will not reconsider arguments previously considered and resolved. *WWIZ,*

4. We have under consideration the following measurements of WPGW's 0.025 mV/m contour.

Source of Measurement	*Distance to WPGC's 0.025 mV/m Contour*
January 1977 (GMBC)	122.0 Miles[4]
July 1978 (GMBC)	117.5 Miles
July 1978 (GMBC)[5]	115.3 Miles
May-June 1983 (Joint)	122.5 Miles[6]
Average distance to WGPC's 0.025 mV/m Contour	119.325 Miles

5. We computed the distance to GSM's 0.5 mV/m contour using the following measurements:

Source of Measurement	*Distance to GSM's 0.5 mV/m Contour*
April 1982 (GMBC)	10.2 Miles
May-June 1983 (Joint)	7.35 Miles[7]
Average distance to GSM's 0.5 mV/m contour	8.775 Miles

The combined distances of the 0.025 mV/m contours and the 0.5 mV/m contour is 128.1 miles.[8] Since WGPC is located 128.2 miles from GSM's proposed site, there is no overlap.[9] There being no genuine issue of material fact for determination at a hearing, we will grant GSM's application.[10]

6. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed December 26, 1984, by GSM Media Corporation IS GRANTED, and the Memorandum Opinion and Order, FCC 84-550, released November 23, 1984, IS MODIFIED to the extent indicated herein.

Inc., 37 FCC 685, *aff'd sub nom., Lorain Journal Co.* v. *FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 363 U.S. 967 (1966).

[8] The Review Board computed two alternative averages, using different sets of measurement data, and finding overlaps of .66 and .1 miles. 94 FCC 2d at 1174. Our computations differ from the Board's in several respects: (a) we did not consider GSM's measurements of its 0.5 mV/m contour (see note 3 *supra*); (b) we considered both sets of measurements made by GMBC in July 1978 (see note 5 *supra*), the Board used only one set in finding an overlap of .66 miles and both sets in finding an overlap of .1 mile); and (c) we averaged the differing analyses of the 1983 joint data (see note 6 *supra*), the Board used only GSM's analysis.

[9] If we were to delete GMBC's January 1977 calculations of WPGW's 0.025 mV/m contour because of its reliance on Figure M-3 as opposed to actual measurements (note 3, *supra*), the combined contour distance would be only 127.2 miles.

[10] See FCC 82D-78, released December 15, 1982. In light of this conclusion, the remaining arguments in GSM's petition for reconsideration may be dismissed as moot.

7. IT IS FURTHER ORDERED, That the application (File No. BP-20,202), filed by GSM Media Corporation, for a construction permit for a new AM radio station, at Ontario, Ohio, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Carelessness
Legal Qualifications
Ownership and Management, Integration of
Proposal, Effectuation of
Site Availability

Review Board affirmed one applicant's site disqualification and misrepresentation/ineptness demerit; reduced ownership integration credits of other applicants because of inadequate corporate underpinnings or unreliable integration commitments; and awarded TV construction permit to new winner, a limited partnership whose general partner was given 100% integration credit over objections.
—*Houston Family TV, Ltd.*
BC Docket No. 82-686

FCC 85R-56

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Houston Family Television, Ltd. Houston, Texas	BC Docket No. 82-686 File No. BPCT-820507KE
SMJ Television Company Houston, Texas	BC Docket No. 82-687 File No. BPCT-820510KK
Alliance Broadcasting Company, Ltd. Houston, Texas	BC Docket No. 82-688 File No. BPCT-820510KM
Urban Broadcasting Systems Houston, Texas	BC Docket No. 82-693 File No. BPCT-820510KR
For Construction Permit	

Appearances

Rudolph L. Ennis, on behalf of Houston Family Television, Ltd.; *Barry D. Wood, Antoinette D. Cook, John D. Quale,* and *Richard E. Wiley,* on behalf of SMJ Television Company; *Seymour M. Chase* and *Robert A. Zauner,* on behalf of Alliance Broadcasting Company, Ltd.; and *James P. Riley, Patricia A. Mahoney,* and *Daniel M. Redmond,* on behalf of Urban Broadcasting Systems.

DECISION

Adopted: July 1, 1985; Released: July 10, 1985.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD MEMBER JACOBS:

1. After some three years of hearings, four of the original ten applicants remain in this contest for authority to construct a new commercial television broadcast station to operate on UHF Channel 61 at Houston, Texas. See Hearing Designation Order (HDO), Mimeo No. 6506, released September 28, 1982. As to these four — Houston Family Television, Ltd. (Family), SMJ Television Company (SMJ), Alliance Broadcasting Company, Ltd. (Alliance), and Urban Broadcasting Systems (Urban) — presiding Administrative Law Judge John H. Conlin (ALJ) granted summary decision in Urban's favor on an HDO site availability issue;[1] added potentially disqualifying misrepresentation/lack of candor, legal qualifications, and corporate structure misrepresentation issues against Alliance[2] and site availability, reporting, misrepresentation/lack of candor, and ineptness issues against Family;[3] and expanded the standard comparative issue to encompass comparative service area coverage[4] and the need for specialized Spanish-language programming in the Houston market.[5] The Initial Decision (I.D.), FCC 84D-82, released December 5, 1984, paras, 92, 95, disqualified Family on the site availability issue and assessed a "comparative demerit of major proportions" on Family's remaining issues, "which would effectively remove Family from further consideration . . . were it not already disqualified . . . ." On the other hand, Alliance was neither disqualified nor given any comparative

[1] Order, FCC 83M-856, released March 14, 1983.

[2] Order, FCC 83M-1211, released April 13, 1983.

[3] Memorandum Opinions and Orders, FCC 83M-1249, released April 15, 1983, and FCC 83M-2838, released August 23, 1983.

[4] Order, FCC 83M-655, released February 25, 1983.

[5] Order, FCC 83M-862, released March 15, 1983.

demerits. Indeed, the ALJ concluded that Alliance's application should be granted, based on the ownership integration, comparative coverage, and specialized programming preferences that it garnered. I.D., para. 118.

2. The proceeding is now before the Review Board on exceptions to the I.D. and reply briefs filed by all of the applicants. Oral argument was held on May 10, 1985. The Board has reviewed the I.D. in light of the foregoing and our examination of the record, and we adopt the ADJ's findings of fact and conclusions of law, except as modified herein. However, we conclude that the corporate ownership arrangements underlying Alliance's ownership integration credit were fatally fluid and informal when they should have been firm, thereby destroying Alliance's integration preference and its comparative superiority. As between Urban and SMJ, Urban is the comparatively superior applicant, and we hold that grant of Urban's application will best serve the public interest, convenience, and necessity.

3. *Family's site availability, reporting, misrepresentation/lack of candor, and ineptness issues.* Paragraphs 62-78 and 92-95 of the I.D. fully detail the sorry history of Family's misbegotten attempts to specify a viable transmitter site for its proposed station. In short, Family proposed four sites during the 18-month period between May 5, 1982, when its Houston application was filed, and February 13, 1984, when its fourth effort was rejected because the status of its third site was still *sub judice* in this proceeding. See Order, FCC 84M-730, released February 13, 1984. Despite the assistance of engineering consultants and others, Family's efforts have been a tragedy of errors which "[r]ather than being diligent . . . can better be described as an exercise in damage control designed to salvage the application from Family's own errors and misjudgments." FCC 84M-730, *supra,* at para. 4. We affirm Family's disqualification on the site availability issue, the ALJ's refusal to entertain the fourth site proposal, and the assessment of a substantial comparative demerit for Family's gross carelessness, ineptitude, and misrepresentations in the prosecution of its application.

4. As to Family's contested site, a location in the Knight-Almeda subdivision which was also specified by DHL Broadcasting Company (DHL — then another applicant in the proceeding), the record reflects that Richard P. Holgin, Family's general partner, had a single telephone conversation with Janet Musselman, daughter of the agent/trustee of the site, concerning its availability sometime during the week before the proposed site amendment was filed on May 23, 1983. Family Exh. 5; Tr. 364-65. Holgin testified that it was his understanding that "we could use the property," Tr. 365, and that he endeavored to confirm this by sending Musselman a letter on May 23, saying in pertinent part (Family Exh. 5) (emphasis added):

> [W]e understand that should Family be the successful applicant before the Federal Communications Commission and DHL does not exercise its option, you are *willing to deal* with Family regarding the property.

In response, a mere eight days later, on May 31, 1983, Musselman executed an affidavit which Holgin understood to say that "we do not have — that she's not going to let anybody use — the land except DHL" (Tr. 500). After Holgin read the affidavit (it was an attachment to DHL's motion to modify issues, filed June 9, 1983, which precipitated this site inquiry via FCC 83M-2838, *supra* n. 3), he contacted his attorney about it but never contacted Musselman or the site's agent/trustee to remonstrate. Tr. 502. Instead, three months after the hearing on this issue (October 11, 1983) and eight months after Musselman's affidavit, Family filed its fourth site proposal, which the ALJ rejected.

5. The specification of a transmitter site in an application or amendment is an implied representation that the applicant has obtained reasonable assurance that the site will be available. *William F. Wallace,* 49 FCC 2d 1424, 1427, 32 RR 2d 105, 109 (Rev. Bd. 1974). An applicant need not have a binding agreement or absolute assurance, but a mere possibility, assumption, or hope that the site will be available will not suffice. *Id.; Shoblom Broadcasting, Inc.,* 93 FCC 2d 1027, 53 RR 2d 1203, and 95 FCC 2d 444 (Rev. Bd. 1983), *rev. denied,* FCC 84-119 (Comm'n 1984), *aff'd per curiam sub nom. Royce International Broadcasting Co.* v. *FCC,* Case No. 84-1168 (D.C. Cir. April 30, 1985). While Holgin may have *thought* that he had reasonable assurance, Musselman's almost simultaneous dashing of his hopes suggests, as the ALJ concluded, that he was proceeding on little more than rash and unwarranted assumptions. I.D., para. 95. Reasonable assurance requires more than a vague (and, here, apparently misunderstood) "willingness to deal" if a *bona fide* option holder does not exercise its option. *See South Florida Broadcasting Co., Inc.,* 57 RR 2d 495 (Rev. Bd. 1984).[6]

6. In light of Holgin's testimony that Family was exploring "a whole lot of sites" (Tr. 499) after it learned definitely on March 4, 1983 that its second site was unavailable (Tr. 498), the Commission had a right to expect that the third site would be selected and designated with greater care and correctness than its antecedents. In the context of this record, Family's rapid and successive selection failures — which engendered three separate motions to enlarge issues and two issue designations — do

[6] We find no inconsistency in the ALJ's prior refusal to add a site availability issue in Order, FCC 83M-773, released March 8, 1983, against Urban, which also proposed the same site specified by DHL. There, Urban was advised by the site's agent/trustee that if DHL did not exercise its option to lease the land and construct a television tower, the site could be leased by Urban. Musselman's May 31, 1983 affidavit was interpreted by the ALJ in FCC 83M-2838, *supra* n. 3, as ruling out that alternative for Family. Hence, Family lacked reasonable assurance in the event DHL did not exercise its option.

not betoken a well-meaning "run of bad luck," *Bison City TV 49 Limited Partnership,* 91 FCC 2d 26, 30, 52 RR 2d 63, 65 (Rev. Bd. 1982), but rather consummate lack of care and good faith. On March 18, 1983, Family conceded that its second site was unavailable, FCC 83M-1249, *supra* n. 3 at para. 2, and it did the same as to its third site at the October 11, 1983 hearing session (paragraph 4, *supra*). Thus, its application is now substantially incomplete and patently defective since it lacks a viable transmitter site, *Shoblom Broadcasting, Inc., supra,* and we agree with the ALJ's conclusion in FCC 84M-730, *supra,* that Family failed to demonstrate good cause for its belated fourth site proposal. *See Shoblom Broadcasting, Inc., supra* (lack of diligence, voluntariness, and hearing disruptiveness of postdesignation engineering amendment held fatal to acceptability); *Erwin O'Conner Broadcasting Co.,* 22 FCC 2d 140, 143, 18 RR 2d 820, 824 (Rev. Bd. 1970). Hence, Family stands disqualified.

7. The foregoing analysis also supports the substantial comparative demerit that the ALJ assessed against Family. Carelessness and ineptitude demerits were once rare, but they are becoming more common. *See Minority Broadcasters of East St. Louis, Inc.,* 99 FCC 2d 264, 56 RR 2d 275 (Rev. Bd. 1984), *rev. denied,* FCC 85-131 (Comm'n 1985) (slight demerit for non-decisional carelessness in preparing engineering exhibits); *Kaye-Smith Enterprises,* 98 FCC 2d 675, 56 RR 2d 252 (Rev. Bd. 1984), *rev. den.,* FCC 85-192 (Comm'n 1985) (slight demerit for notarial imperfections). Family urges that if its lackluster performance warrants any sanction it should be slight. We disagree, for in the instant case Family's ineptitude ran to decisionally significant matters (site availability) and also carried with it the repugnant odor of misrepresentation and lack of candor. We defer to the ALJ's demeanor/credibility findings, I.D., para. 95, that the record evidence does not demonstrate a disqualifying willful and calculated effort to deceive the Commission. *See Old Time Religion Hour, Inc.,* 95 FCC 2d 713, 722, 54 RR 2d 989, 996 (Rev. Bd. 1983), *rev. denied,* FCC 85-104 (Comm'n 1985). However, like the ALJ, we perceive a pattern of significant carelessness and misrepresentation which warrants a significant comparative demerit, even without evidence of intent to deceive. *See Merrimack Valley Broadcasting, Inc.,* 55 RR 2d 23 (1983), *modified,* 57 RR 2d 713 (1984). A substantial demerit appropriately measures the blurred distinction between willful and clumsy misconduct in the instant case. *See Coastal Bend Family Television, Inc.,* 94 FCC 2d 648, 659, 54 RR 2d 367, 374 (Rev. Bd. 1983)(substantial demerit instead of disqualification for "many blunders and miscues").[7]

[7] We reject Family's exception that the site availability and ineptitude/misrepresentation issues should have been resolved in its favor because its opponents allegedly did not carry their burdens of proceeding with the introduction of evidence on the issues. Family had the burden of proof on both sets of issues and did not succeed in overcoming the adverse

8. *Alliance's legal qualifications and corporate structure misrepresentation issues.* Alliance is a limited partnership whose sole general partner is Alliance Broadcasting Corporation (Alliance Corp.). Alliance Corp. has seven voting stockholders, all of whom are proposed to be integrated full time into the station's operation. When the subject issues were added in April 1983 (FCC 83M-1211, *supra* n. 2), Alliance Corp. was a separate applicant in this proceeding. The present arrangement is the result of a 1984 merger with two other former applicants (K-Ram Corporation and Third Coast Broadcasters, Inc.). The issues were not mooted by the merger because of Alliance Corp.'s continued integration proposal in its role as Alliance's general partner and because of the direct relationship between quantitative ownership integration credit and the underlying indicia of corporate ownership or voting control. *See Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506, 510, 52 RR 2d 1210, 1213 (Rev. Bd. 1982); *Peoples Broadcasting Corp.*, 92 FCC 2d 1303, 1322-25 and n. 31, 52 RR 2d 1617, 1632-35 and n. 31 (Rev. Bd.), *rev. denied*, FCC 83-594 (Comm'n 1983); *cf. Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488, 49 RR 2d 1589, 1593-94 (1981) (integration credit for limited partnerships based strictly on voting control).

9. As to legal qualifications, the record shows that Alliance Corp. was incorporated under the laws of the State of Texas on April 2, 1982, more than a month before its application was filed, and has been in good standing ever since. Alliance Exh. 15, p. 2; I.D., paras. 83, 99. However, the record also shows that corporate affairs were conducted on a very informal basis until September 22 - October 3, 1983 — 18 months later — when the corporate directors signed 11 documents ratifying *nunc pro tunc* all actions of the corporation and its directors dating back to May 10, 1982. Alliance Exhs. 17-27. The ALJ excused this legal legerdemain on the grounds that the principals had, in fact, conducted their business by telephone or at informal meetings in the interim, I.D., para. 88, and that "this is the case with many corporate applicants whose stock is closely held . . . [and] there is no Commission requirement that a corporate applicant follow any specific procedures in conducting its business," I.D., para. 101. But these observations avoid the crucial question, namely whether there was indeed a true corporate entity between April 1982 and October 1983 or only a loose association of individuals who might or might not mature into a corporation. At the heart of this quandary is the undisputed fact that none of Alliance Corp.'s seven putative "voting stockholders" even signed stock subscription agreements, let alone paid

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implications of the record evidence, regardless of its source. *Cf. Elyria-Lorain Broadcasting Co.*, 6 RR 2d 191 (1965) (burden of proof placed on applicants where information is peculiarly within their knowledge); *Lorenzo W. Milan*, 4 FCC 2d 610, 7 RR 2d 765 (1966) (applicant has burden of proof on site availability issue).

for any of their shares, until June 24, 1982, when 20% "owner" Charles W. Harrison signed an agreement. Alliance Exh. 15, p. 11. Elayne S. Tater, a 2.5% "owner," signed the following week, Alliance Exh. 15, p. 19; Tr. 1009, and the remaining five "owners" signed agreements on January 31, 1983. Under these circumstances, we cannot conclude that any legally *meaningful* Alliance Corp. entity existed for Commission purposes prior to January 31, 1983 (when a majority of the corporation's authorized stock was subscribed).[8] Until that time, Alliance Corp. was a hollow corporate shell, but this may have been enough for *technical* legal qualifications, especially in light of subsequent corporate activity. Therefore, we reluctantly affirm the ALJ's *nunc pro tunc* approval of this initially thin alliance; however, we more confidently agree with his conclusion that, given the paucity of information now required by FCC Form 301 and the absence of guiding Commission precedent, Alliance Corp. made no culpable misrepresentations in its application concerning its structure.

10. On the other hand, the implications of this stunted corporate posture for Alliance's ownership integration credit are much graver. It is well established that an applicant may claim quantitative integration credit for subscribed as well as issued stock, *Bradley, Hand and Triplett, supra*; however, no credit will be given for mere stock options because option holders, unlike stock subscribers, are not obligated to take and pay for their shares, *Peoples Broadcasting Corp., supra*. In the instant case, Urban strenuously excepts to the ALJ's grant of 100% integration credit to Alliance, given the belated ownership commitments of Alliance Corp.'s seven stockholders. See paragraph 9, *supra*. In particular, Urban stresses that as of what it perceives to be the critical "B cut-off" date for final upgrading of comparative showings — June 30, 1982 — only 22.5% of Alliance Corp.'s stock was subscribed, *id.;* hence, Alliance deserves no more than 22.5% integration credit. We agree.

11. Where an applicant sets forth a specific integration proposal, does not depart from it, and provides reasonable assurance that it will be carried out, we will credit that proposal. *Bradley, Hand and Triplett, supra,* 89 FCC 2d at 662, 51 RR 2d at 387. Here, the ALJ required the filing of final integration proposals on December 23, 1982. Tr. 14-17. Therefore, that date rather than June 30, is critical in evaluating Alliance's proposal. *See Northland Communications,* FCC 85R-30, released April 8, 1985 (Rev. Bd.), para. 5. And on that date Alliance Corp.

[8] We do not reach Urban's broader assertion that under applicable Texas law the stock subscription agreements were not effective until accepted by the corporation in the first "unanimous consent" *nunc pro tunc* ratification (Alliance Exh. 17), which, by its own terms, was not effective until the last director signed on October 3, 1983. *Cf. Bradley, Hand and Triplett,* 89 FCC 2d 657, 51 RR 2d 383 (Rev. Bd. 1982) (New Jersey corporate law concerning definition of stockholder not relevant to Commission's ownership integration policies).

duly listed its seven "stockholders" and their proposed integrated roles. December 23, 1982 Written Statement of Alliance Broadcasting Corporation, Exh. B. However, as previously noted (paragraph 9, *supra*), only two of the seven, representing a mere 22.5% of Alliance Corp.'s stock, had even signed stock subscription agreements by that date — eight months after formal incorporation and seven months after Alliance Corp.'s application was filed. Alliance attempted at hearing to paper over this glaring deficiency by introducing into evidence a series of identical notarized statements by the seven principals, signed May 19-29, 1983, in which they uniformly aver (Alliance Exh. 15, pp. 6, 8, 10, 12, 14, 16, 18):

> In 1982, when I agreed to join the Alliance Broadcasting Corporation and to participate in its application . . . I understood that I was agreeing to purchase and to pay for shares of common stock of the corporation. I have signed a subscription agreement . . .

We give no weight to this self-serving and hopelessly belated effort to demonstrate that the seven principals had at least an oral agreement to be stockholders dating back to sometime "in 1982". And even if they did, we conclude that such an "agreement" can be given no more integration credit than unexercised stock options, *i.e.*, no credit at all. See paragraph 10, *supra*. Oral understandings, stock options, and other inchoate ownership arrangements, until finalized, simply do not provide the type of "reasonable assurance" that *Bradley, Hand and Triplett* requires as an underpinning for ownership integration credit. To rule otherwise would permit a corporate applicant such as Alliance to hypothesize a formidable integration proposal in its application, *sans* any binding ownership commitment, and then try to scare off comparative competition. If, as in the instant proceeding, its application appeared likely to prevail, it could demand stock subscriptions and purchases; on the other hand, if it came a cropper, the putative integrated principals could bail out without making any investment. The Commission cannot countenance such integration gamesmanship. A timely binding subscription agreement is the minimum price of admission for quantitative ownership integration credit. Hence, we hold that Alliance deserves no more than 22.5% quantitative credit for its integration proposal. Since this credit diminution effectively removes Alliance from the comparative competition here, we need not reach the exceptions which attack Charles Harrison's 20% integration in terms of the Texas criminal courts misrepresentation/lack of candor issue that the ALJ resolved in his favor, or which argue that his proposed integrated role as Alliance's director of public relations is non-managerial. We turn, instead, to SMJ's application.

12. *SMJ.* Susan M. Jaramillo is the sole owner of SMJ and proposes to be her station's full-time general manager. She is Hispanic, has previous broadcast experience since 1977, and at the time of the hearing was

general manager of Station WDZL(TV), Miami, Florida. Jaramillo was also sole general partner and 17.5% owner of 39 Broadcasting, Ltd., the permittee of WDZL(TV). On June 30, 1982, the "B cut-off" date, Jaramillo filed a timely divestiture commitment concerning WDZL(TV) to the effect that if the SMJ application were granted, she would dispose of her ownership interest in and resign from her position as general manager of WDZL(TV) prior to the grant of program test authority. I.D., para. 20. The ALJ fully credited Jaramillo's 100% quantitative integration proposal. I.D., para. 108.

13. Urban and Alliance urge in their exceptions that SMJ should be stripped of all integration credit because Jaramillo's integration proposal is inherently unreliable. They base their challenge on the fact that Jaramillo's June 30, 1982 WDZL(TV) divestiture commitment came just five months after the construction permit for WDZL(TV) was granted via approval of a settlement agreement (FCC 82M-0312, released January 28, 1982) and four months before WDZL(TV) even began operations. They argue that the fact that Jaramillo even filed the SMJ application a mere four months after the WDZL(TV) grant shows that her Miami integration commitment was unreliable, and that she formed her intention to abandon the Miami application while the settlement negotiations leading to the Miami grant were still in progress. Hence, according to the exceptors, since Jaramillo's Miami integration commitment was so short-lived and unreliable, her Houston integration commitment cannot be trusted.

14. SMJ makes several responses to these serious charges. First, it emphasizes that Jaramillo began working full time as general manager of WDZL(TV) in early 1982 (supervising construction of the station and hiring personnel) and continued until her services were involuntarily terminated in June 1984. Thus, she served 2 1/2 years in her integrated position and, by implication, would still be working there but for her termination. In this way SMJ attempts to distinguish Jaramillo's integration commitment from that of a principal in *Washington's Christian Television Outreach, Inc.*, 94 FCC 2d 1360 (Rev. Bd. 1983), who was proposed as full-time general manager of a station but accepted a graduate fellowship one week after grant of the construction permit, never worked more than part-time at the station, and never informed the Commission of any change in her integration proposal. There, the Board remanded the proceeding for examination of the good faith of the original integration commitment under the test in *Tidewater Teleradio, Inc.*, 24 RR 653, 657 (1962): integration proposals must be "discharged in good faith (with whatever revisions are felt necessary in light of changed circumstances)" and must be "seriously advanced and seriously regarded in actual operation." SMJ maintains that, in contrast, Jaramillo fulfilled all of her obligations until terminated involuntarily, and that the mere

filing of a mutually exclusive application for Houston which was unlikely to be acted upon for years scarcely constituted abandonment of Jaramillo's Miami commitment.

15. SMJ's second argument focuses on the settlement terms of Jaramillo's Miami grant. Essentially SMJ maintains that, unlike *Alexander S. Klein, Jr.*, 88 FCC 2d 583, 50 RR 2d 789 (1981), *Tidewater*, and *Washington's Christian*, in which the applicants assertedly either did not fulfill, or sought to escape the burden of, their commitments after being awarded grants "premised squarely on those commitments," in the instant case Jaramillo "did not 'win'." SMJ Reply Br. at 4. According to SMJ, Jaramillo's application was very drastically altered by a settlement which reduced her equity from a majority to less than a fifth of the total. Under these circumstances, SMJ apparently believes that Jaramillo should not be faulted for resolving to seek a Houston license, which would have more favorable equity terms (Tr. 707-08), shortly after the Miami settlement was approved (i.e., in April or early May 1982, Tr. 670), and for not informing the competing applicant (or the Commission) of her Houston intentions during the Miami settlement proceedings, Tr. 671. Indeed, Jaramillo testified that if she had received the Miami grant without merger and loss of equity, she would not have filed a Houston application. Tr. 707. She also testified that her intention to abandon the Miami grant already existed at the time she filed her Houston application. Tr. 668.

16. The Board cannot condone the integration gamesmanship displayed by Jaramillo in these proceedings. We have recently had occasion to criticize contingent integration proposals, *Gene Sudduth Co., Inc.*, 99 FCC 2d 137, 141, 56 RR 2d 1326, 1328 (Rev. Bd. 1984), and to disallow integration credit for such proposals, *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 55 RR 2d 627 (Rev. Bd. 1983), *rev. denied*, 56 RR 2d 1394 (Comm'n 1984); *Metro Broadcasting, Inc.*, 57 RR 2d 440 (Rev. Bd. 1984) (contingent proposal of Leticia Jaramillo, Susan Jaramillo's sister, given no credit); and *Northern Sun Corp.*, 57 RR 2d 1550, *recon, denied*, FCC 85R-42 (Rev. Bd. 1985), on the grounds that they are too uncertain to permit reasonable comparison with unconditional proposals and because they are inconsistent with the emphasis of the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 n. 6, 5 RR 2d 1901, 1909 n. 6, on "permanent" proposals. *Cf. Henderson Broadcasting Co., Inc.*, 63 FCC 2d 119, 39 RR 2d 257 (Rev. Bd. 1976) (winning applicant warned about serious consequences of not honoring integration commitment on permanent basis). In our view, Jaramillo's Miami integration commitment became conditional once she formulated her intention to abandon that application in favor of her Houston proposal. Although that decision was reached no later than May 10, 1982 (when Jaramillo filed her

Houston application), Tr. 668, it was not revealed to the Commission until SMJ's divestiture commitment was filed on June 30, 1982, some 51 days later. This was not timely. *Cf. Metro Broadcasting, Inc., supra* (no demerit assessed for 27-day delay in disclosing contingent integration plans). We need not speculate whether or how timely notification to the Commission and the parties might have affected the Miami settlement, and no reporting or candor issue has been specified against SMJ in this proceeding which could evoke a demerit based on Jaramillo's silence. However, as the exceptors urge, we are very properly concerned about the implications of Jaramillo's conceded conduct for the reliability of her integration proposal in this proceeding.

17. Contrary to SMJ's position, we do not believe that a less than fully favorable settlement agreement is the kind of "changed circumstances" that *Tidewater Teleradio* had in mind as the basis for altering an integration commitment, because entering into such a settlement is a purely voluntary act. In any event, it is established that settlement of a case does not allow the successful applicant to casually abandon its comparative representations, even when the competing applicants consent to the abandonment. *Alexander K. Klein, Jr., supra.* The integrity of our licensing process does not permit the unilateral abandonment of what are supposed to be "permanent" undertakings without at least appropriate notice to the Commission, consistent with the "substantial and significant changes" reporting requirement of Section 1.65 of the Rules and *Tidewater Teleradio,* whether or not the undertaking in question lies at the heart of a settlement. Where such notice is lacking, as here, inevitable questions are raised about the *bona fides* and reliability of the original proposal. Similarly, the fact that Jaramillo did not immediately abandon her Miami integration proposal *physically* does not make her Miami proposal any less contingent for comparative purposes. *See Metro Broadcasting, Inc., supra.* It is the inherent uncertainty of a contingent proposal and its incompatibility with a permanent commitment which make it untrustworthy and uncreditable, not the question of how quickly a contingency may be resolved.[9] Under these circumstances, and recognizing that integration credit may be diminished or even eliminated on the basis of an owner's past proclivity to withdraw from broadcast enterprises or his failure to honor fully previous integration commitments, *see Seven Locks Broadcasting Co.,* 37 FCC 82, 86 (1964); *Washington's*

[9] Here we note SMJ's prognosis that its 10-party proceeding might go on "for years" (paragraph 14, *supra*). *But see Lowcountry Women Communications, Inc.,* FCC 84M-5378, released December 28, 1984, in which a 13-party proceeding was settled after only 10 months. *See also Northland Communications,* FCC 85R-30 (Rev. Bd. 1985), where a contingent integration provision was satisfied prior to the ALJ's deadline for the submission of integration proposals (the relevant "cut-off" date in that proceeding).

Christian Television Outreach, Inc., supra, we conclude on this record that sufficient question has been raised about the reliability of Jaramillo's integration commitments to warrant diminishing — but not totally discounting — her Houston integration credit. *Seven Locks Broadcasting Co., supra.* The net effect of this action is to drop her application to second place — behind Urban — in the final comparative analysis.[10]

18. *Urban.* Urban is a California limited partnership in which Charles E. Walker is the sole general partner, 47% equity owner, and proposed general manager. Mr. Walker is Black and has broadcast production, direction, and writing experience dating back to the early 1970's. I.D., paras. 56-58. The Urban partnership originally involved Walker as 25% general partner and 24.48% limited partner, Stewart S. Romans as 10% limited partner, Barnett J.W. Grier, Jr. as 15% limited partner, and Frederick A. Kennedy as 5% limited partner. By Order, FCC 83M-2776, released August 18, 1983, the ALJ approved a merger between Urban and DHL (see paragraph 4, *supra*) under which DHL became an Urban limited partner. By Order, FCC 83M-3736, released October 20, 1983, he accepted an August 15, 1983 Urban amendment reflecting the following equity changes in the limited partnership resulting from the merger: Walker remained as 25% general partner but became 22% limited partner; Messrs. Romans and Kennedy withdrew from the partnership; Grier became 4% limited partner; and DHL became 49% limited partner. Satisfied that, as general partner, Walker will have full control of the operation and management of Urban's proposed station, the ALJ gave Urban 100% quantitative integration credit based on Walker's role. I.D., paras. 57, 108.

19. SMJ and Alliance vehemently attack Urban's integration proposal in their exceptions, asserting that Walker is a DHL "pawn" who lacks the "true controlling interest normally adhering to general partner status" (Alliance Br. at 10) and that "economic realities give DHL . . . the ability to exercise complete control over the affairs of the partnership, thereby rendering Urban's integration proposal unbelievable and unreliable" (SMJ Br. at 30-31). As supporting case precedent, they rely heavily on *KIST Corp.*, 99 FCC 2d 173, 57 RR 2d 49 (Rev. Bd. 1984); *Hispanic Owners,*

[10] Even without this diminution, SMJ would only finish second vis-a-vis Urban, because the very slight overall integration preference that its 100% female qualitative enhancement credit might warrant (Urban and SMJ both deserve 100% minority enhancement credit and are essentially equal in all other quantitative and qualitative respects) is overcome by the slight comparative coverage preference (called "modest" by the ALJ) to which Urban is entitled because of its overall 7% (200,000 people) coverage advantage and provision of new fourth and fifth service to 5,253 people. *See Daytona Broadcasting Co., Inc.*, 97 FCC 2d 212, 55 RR 1326 (Rev. Bd. 1984), *rev. denied*, FCC 85-318 (Comm'n 1985); *Caldwell Broadcasting Corp.*, 57 RR 2d 1039 (Rev. Bd. 1985); *cf. Northern Sun Corp., supra* (slight integration preference outweighs very slight coverage preference under "best practicable service" comparative analysis).

Inc., 57 RR 2d 695 (Rev. Bd. 1985); and *Henderson Broadcasting Co.*, 63 FCC 2d 419, 39 RR 2d 1099 (Rev. Bd. 1977), in all of which the Board denied integration credit to corporate or partner principals who were found to lack adequate *de facto* ownership or control attributes or to be beholden to veiled financial "sugar daddies."

20. In law, as in the garden shop, recently acquired or sharpened tools tend to be overused or even abused. So it is with the above-cited cases. We affirm the ALJ's conclusion that Walker has adequately proved the *bona fides* of his integration role and that his detractors' objections are essentially speculative and unsubstantiated. It has become fashionable recently in the adjudicatory process to seek broad discovery concerning the details of limited partnerships, in order to determine their *bona fides*, under the *KIST* flag. However, ALJs have properly held that *KIST* does not support indiscriminate inquiries lacking a *prima facie* basis. *E.g.*, *East Hampton Broadcasting Co., Inc.*, FCC 84M-4660, released November 2, 1984 (ALJ Miller) (inquiry denied where general partner has 65% equity interest, limited partner will not be integrated, and nothing has been raised to suggest that the limited partnership is not *bona fide*). We commend this careful approach. In the instant case, no such discovery occurred but Walker was extensively cross-examined at hearing concerning the Urban limited partnership (Tr. 1384-1419).

21. Walker testified that the Urban partnership was set up in accordance with California limited partnership law and "to conform to FCC stipulations" (Tr. 1402); that he would have "full and complete management and control" (Urban Exh. 1, p. 1); that he made "financial contributions" to the partnership prior to the DHL merger (Tr. 1419) and had given the partnership a $5000 promissory note as his post-merger contribution (Tr. 1409); that his current sources of income are $2,500 per month paid by DHL for his pre-license Urban-related work (Tr. 1409-11), residuals through the Directors Guild for past work (Tr. 1417-A), and income from current freelance work (*id.*); that there are no understandings between Urban and DHL which would permit DHL persons to acquire any general partnership interest or permit the partnership to be converted into a corporation (Tr. 1411-12); that DHL will provide the "first $2 million" necessary to construct Urban's proposed station (Tr. 1398); and that he is personally liable for the partnership's obligations and is prepared to sustain that liability (Tr. 1403). We also find that the merger did not alter Urban's integration proposal; Walker was proposed as Urban's sole general partner and full-time general manager in its December 23, 1982 Integration Statement and has remained so ever since.

22. Not having offered any rebuttal evidence at hearing, SMJ and Alliance now oppose Urban's ample indicia of *bona fides* only with bald claims that "Walker cannot take any action without DHL's backing" (SMJ

Br. at 32), "it is apparent that he has no means by which to pay . . . any . . . creditor should he be called upon to do so" (*id.*), and "It is simply unbelievable that DHL would provide all of Urban's funding and would then refrain from exercising enough control over the operation of the station to protect its investment . . . ." (Alliance Br. at 11). There is no record evidence to support any of these surmises, and the *KIST, Hispanic Owners,* and *Henderson* cases cannot be made to fit. Unlike those cases, Walker has been proposed for integration and substantial equity ownership in the Urban application from the beginning, he has made financial contributions to the partnership and is not shielded from personal financial liability, and no agreement language has been brought to our attention which undermines his sole operational and managerial authority.[11] Given such unrebutted evidence, we hold that Urban is entitled to 100% integration credit for Walker's role as proposed general manager. *See San Joaquin TV Improvement Corp.*, 96 FCC 2d 594, 599, 54 RR 2d 1206, 1210 (Rev. Bd. 1983) (application for review pending) (100% integration credit awarded even though no capital contributions were to be made by general partners).

23. *Final comparative evaluation.* All exceptions having decisional significance have been considered by the Board. We affirm the ALJ's awarding of a very slight comparative preference to Urban and SMJ over Alliance on the comparative criterion of diversification of mass media control. *See Reginald A. Fessenden Educational Fund, Inc.*, FCC 85R-7, released January 30, 1985 (Rev. Bd.), para. 6; *Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984, 988, 55 RR 2d 926, 929-30 (1984); *Cleveland Television Corp.*, 91 FCC 2d 1129, 52 RR 2d 581 (Rev. Bd. 1982), *rev. denied,* FCC 83-235 (Comm'n 1983), *aff'd,* 732 F.2d 962 (D.C. Cir. 1984). We also affirm Family's site disqualification and substantial comparative demerit. As to the remaining applicants, Alliance cannot successfully compete against Urban because the latter is entitled to a substantial ownership integration preference over Alliance (100% integration credit versus 22.5%), *see Muncie Broadcasting Corp.*, 89 FCC 2d 123, 51 RR 2d 46 (Rev. Bd. 1982), *rev. denied,* FCC 83-234 (Comm'n 1983), which, together with Urban's diversification preference, greatly outweighs the very slight comparative coverage preference that Alliance enjoys over Urban and the contested moderate specialized programming preference

[11] The Commission has written extensively about limited partnership provisions in media concentration and alien ownership contexts recently. *See Attribution of Ownership Interests,* FCC 85-252, released June 24, 1985, *modifying* 97 FCC 2d 997, 55 RR 2d 1465 (1984), and *Declaratory Ruling Concerning Citizen Requirements,* FCC 85-295, released June 25, 1985. However, none of these documents addresses itself to ownership integration credits in broadcast adjudications. In the instant case, no partnership provisions have been challenged as being inconsistent with California or other limited partnership law or with Commission policy.

(which we need not reach) that the ALJ granted Alliance. And we have already held that SMJ finishes second to Urban (see paragraph 17 and note 10, *supra*). (Even with diminished integration credit, SMJ would also finish ahead of Alliance because of SMJ's diversification preference and remaining integration edge.[12]) Thus, Urban emerges from the comparative process as the close but clear winner.

24. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed by Alliance Broadcasting Company, Ltd. on December 19, 1984, February 19, 1985, and June 21, 1985, and by SMJ Television Company on May 7, 1985 ARE GRANTED, and the amendments ARE ACCEPTED; and

25. IT IS FURTHER ORDERED, That the application of Urban Broadcasting Systems (File No. BPCT-820510KR) for authority to construct a new television broadcast station at Houston, Texas IS GRANTED, and the applications of Houston Family Television, Ltd. (File No. BPCT-820507KE), SMJ Television Company (File No. BPCT-820510KK), and Alliance Broadcasting Company, Ltd. (File No. BPCT-820510KM) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

[12] However, SMJ is no longer entitled to the very slight comparative preference for proposing auxiliary power that the ALJ awarded. *See Minority Broadcasters of East St. Louis, Inc.*, FCC 85-131 (Comm'n 1985), in which the Commission held that such preferences are not appropriate in television cases.

FCC 84D-82

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications	
Houston Family Television, Ltd. Houston, Texas	BC Docket No. 82-686 File No. BPCT-820507KE
SMJ Television Company Houston, Texas	BC Docket No. 82-687 File No. BPCT-820510KK
Alliance Broadcasting Company, Ltd. Houston, Texas	BC Docket No. 82-688 File No. BPCT-820510KM
Urban Broadcasting Systems Houston, Texas	BC Docket No. 82-693 File No. BPCT-820510KR
For Construction Permit	

Appearances

Rudolph L. Ennis, Esq., on behalf of Houston Family Television, Ltd.; *Barry D. Wood, Esq., Antoinette D. Cook, Esq.* and *John D. Quale*, on behalf of SMJ Television Company; *Seymour M. Chase, Esq.*, and *Marie T. Riordan, Esq.*, on behalf of Alliance Broadcasting Company, Ltd., *James P. Riley, Esq., Daniel M. Redmond, Esq.* and *Lee W. Shubert, Esq.*, on behalf of Urban Broadcasting Systems; and *Lawrence Bernstein, Esq.*, on behalf of the Chief Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE
LAW JUDGE JOHN H. CONLIN

Issued: November 30, 1984; Released: December 5, 1984

Preliminary Statement

1. This proceeding originally involved ten applicants for a construction permit for authority to construct a new commercial television station to operate on UHF Channel 61 at Houston, Texas.[1] The applications were designated for hearing by *Hearing Designation Order* (HDO), released September 28, 1982. Thereafter, six of the ten applicants were dismissed. *See Order* (FCC 82M-3446), released November 3, 1982 (removing the Steele application from the hearing and returning it to the processing line); *Order* (FCC 82M-3982), released December 14, 1982 (dismissing the Almeda application); *Order* (FCC 83M-2776), released August 18, 1983 (approving the settlement agreement of Urban and DHL and dismissing the DHL application); *Order* (FCC 83M-3742), released October 20, 1983 (approving the settlement agreement of K-Ram and Pan American and dismissing the application of Pan American); and *Order* (FCC 84M-1922), released April 20, 1984 (approving the settlement agreement of Alliance, K-RAM and Third Coast and dismissing the applications of K-RAM and Third Coast). The remaining applications are those of Family, SMJ, Alliance and Urban.

2. No qualifying issues were originally designated against Family or SMJ. Air hazard issues in the HDO against Urban and Alliance were resolved favorably to the applicants by summary decision in orders (FCC 82M-3977), released December 14, 1982, and (FCC 83M-856), released March 14, 1983.

3. The designated issues were, however, enlarged in an *Order* (FCC 83M-1211), released April 13, 1983, to include the following issues against Alliance:

> To determine whether Alliance principal Charles W. Harrison made misrepresentations or was lacking in candor in statements made to the County Criminal Court at Law No. 4 of Harris County, Texas regarding a prior criminal conviction.
>
> To determine whether Alliance is legally qualified.
>
> To determine whether the Alliance application contained misrepresentations regarding its corporate structure and/or whether the application was in compliance with Sections 73.3513 and 73.3514 of the Commission's rules.

4. Four issues were added against Family by *Memorandum Opinion and Order* (FCC 83M-1249), released April 15, 1983, as follows:

> To determine whether Houston Family Television, Ltd., has reasonable assurance of the availability of its proposed transmitter site on the Texas Commerce Tower.

[1] The ten were K-RAM Corporation (K-RAM), Pan American Broadcasting Company (Pan American), Houston Family Television, Ltd. (Family), SMJ Television Company (SMJ), Alliance Broadcasting Corporation (Alliance), Patricia B. Steele (Steele), Third Coast Broadcasters, Inc. (Third Coast), DHL Broadcasting Company (DHL), Almeda Broadcasters, Inc. (Almeda), and Urban Broadcasting Systems (Urban).

To determine whether Houston Family Television, Ltd., has complied with the provisions of Section 1.65 of the Commission's rules by keeping the Commission advised of substantial and significant changes as required by Section 1.65; and, if not, the effect of such noncompliance on its basic and/or comparative qualifications to be a Commission licensee.

To determine whether Houston Family Television, Ltd., has engaged in misrepresentation or conduct lacking candor in its representations to the Commission or under oath; and, if so, whether Houston Family Television, Ltd., possesses the requisite basic character qualifications to be a Commission permittee.

To determine whether there have been repeated errors, inaccuracies, nondisclosures of material facts, and/or inadvertent statements in the Houston Family Television, Ltd., application; and, if so, whether they reflect such negligence, carelessness, ineptness, or disregard of the Commission's processes that the Commission cannot rely upon the applicant to fulfill the duties and responsibilities of a licensee.

Family subsequently amended its application to specify a new site (*See Order*, FCC 83M-2508, released July 28, 1983), and the issue as to the availability of the Texas Commerce Tower site was deleted as moot. *Order* (FCC 83M-2773), released August 18, 1983. The Presiding Officer, however, found that a substantial question also existed as to the availability of Family's newly proposed site and, by *Memorandum Opinion and Order* (FCC 83M-2838), released August 23, 1983, added the following issue:

To determine whether Houston Family Television Ltd., has reasonable assurance of the availability of its proposed antenna site.

In addition, the scope of the standard comparative issues designated in the HDO has been expanded in two respects: (1) to permit the adduction of evidence regarding the areas and population which each applicant proposes to serve (*See Order*, FCC 83M-655, released February 25, 1983); and (2) to permit the adduction of evidence regarding the need for specialized program services in Houston (*See Order*, FCC 83M-862, released March 15, 1983).

5. Prehearing conferences were held on December 10, 1982; February 18, 1983; March 10, 1983; and June 15, 1983. Written direct cases were exchanged on May 23, 1983. The hearing convened in Washington, D.C., on October 5, 1983, with further sessions being held on October 11, 12, 13, 14, 17 and 18, 1983, and April 20, 1984. The record was closed on April 20, 1984. Proposed Findings of Fact were filed by the applicants on or about July 2, 1984 and replies on July 20, 1984.

Findings of Fact (Comparative Issue)

The Community

6. The City of Houston is in the Houston, Texas, Standard Metropolitan Statistical Area (SMSA) and Urbanized Area, which are the second largest (population) SMSA and Urbanized Area in Texas. There are 2,905,353 persons in the Houston SMSA; 2,412,664 in the Houston

Urbanized Area; and 1,595,138 in the City of Houston itself. There are seven television stations in Houston, six commercial and one noncommercial.

Facilities Requested

7. Though all of the applicants propose to operate on Channel 61, there are differences in proposed power, antenna height and transmitter location and thus differences in the area and populations to be served; these are reflected in the following table:[2]

Applicant	*Population*	*Area*
Family	2,917,821	6,437
SMJ	2,999,374	8,837
Alliance	3,220,882	13,563
Urban	3,203,699	12,632

8. None of the applicants will provide a first, second and third primary service to their respective Grade B coverage areas. Moreover, the proposed coverage areas of Family and SMJ are served by at least five other Grade B services. However, Alliance and Urban will provide service to underserved areas. The following is a tabulation of the Grade B service areas of Alliance and Urban having only three or four other services:

Applicant	*Population*	*Area*
Alliance - Grade B Service having:		
only 3 other services	4,520	841.2
only 4 other services	8,989	874.3
Urban - Grade B service having:		
only 3 other services	2,000	160.0
only 4 other services	3,253	234.7

The Applicants

Houston Family Television, Ltd.

9. Family is a limited partnership; the partners and their ownership interest are as follows:

Name	*Nature of Partnership Interest*	*Percentage of Equity Ownership*
Richard P. Holgin	General Partner	33 1/3%
Alfred Garza	Limited Partner	33 1/3%
James H. Thornton	Limited Partner	33 1/3%

[2] Although the engineering data was submitted in a joint exhibit and a corrective supplement thereto (Joint Exs. 1 and 1A), the proposed findings submitted by the applicants contain minor variations in areas and populations. The above gross area and population figures are derived from Ex. 1A, and the differential area and population figures are from Ex. 1, pp 9-10.

10. Family's general partner, Richard P. Holgin, will serve as the general manager of Family's proposed station. Mr. Holgin will fill the position full time, devoting a minimum of 40 hours per week to the task. As general manager, Mr. Holgin will be responsible for supervising and managing the overall operation of the proposed station, with particular emphasis on business and administrative affairs and ultimate protection of the license. He will provide day-to-day supervision of all staff activities and have ultimate responsibility for all station policies and activities.

11. Mr. Holgin is a Hispanic male and a life long resident of Houston. He is currently director of personnel at the University of Houston's Downtown Campus. If Family receives a grant he will resign this position and assume the duties described in the preceding paragraph. Mr. Holgin has no broadcast experience.

12. Mr. Holgin has an extensive record of participation in civic affairs. He is a member of the local American Legion Post and held the positions of Post Commander in 1974, Post Adjutant from 1971 through 1973, and Post Finance Officer in 1970. He currently spends two to four hours per month on Post activities. He served as advisor to the Denver Harbor Development Corporation in 1970 and is a member of the East End Preservation and Development Corporation, which he helped organize in 1970. He also was a member of the Board of Education for a Galveston-Houston Diocese Board of Education during the year 1975-1976. In addition, Mr. Holgin is a charter member of the Stanford University Alumni Association, of which he was President in 1976. He is active in the University of Houston's Amigos Club and in 1981 served as Co-Chairman of the United Way Drive at the University of Houston Downtown Campus. In 1982, he was a member of the Harry O'Kane Gallery Board of Directors (this gallery is the University of Houston Downtown Campus art museum). He is a member of the Hispanic Political Caucus and the League of United Latin American Citizens (LULAC) and was a member of LULAC committees in 1976 and 1977. Finally, Holgin is a member of various professional organizations and an active member of the Immaculate Conception Church in Houston.

13. Neither Family, its general partner nor its limited partners holds an interest in any medium of mass communications.

SMJ Television Company

14. Susan M. Jaramillo is the sole owner of SMJ. She proposes to work full time (at least 40 hours a week) as the station's general manager. In that capacity, she will direct and supervise all aspects of station operations, make day-to-day programming decisions, ensure compliance with FCC rules and policy matters, and be responsible for the supervision

of the station manager and the sales, programming, production, advertising, and promotion departments.

15. Ms. Jaramillo, a Hispanic female, was born in Guayaquil, Ecuador, and lived there for six years. In 1953, her parents moved to Tallahassee, Florida, where they lived for three years until moving to Chicago. She attended the University of Chicago Graduate School of Business. She became a U.S. citizen in 1964.

16. Ms. Jaramillo's broadcast experience began in 1977, when she was employed at WBBM-TV in Chicago, Illinois, as manager of planning. Her responsibilities included organization and analysis of information for the station's weekly sales forecast meetings and evaluation and processing of capital investment requests. She also worked on forecasting market demand and on planning for the station's conversion from film to videotape. Seven months later she became Director of Financial Planning at WBBM. In that position, she supervised the Manager of Planning and Manager of Business Affairs; negotiated and wrote talent, personal service, and lease agreements; provided support to the Sales Department in the areas of inventory, pricing, sales and market forecasting and budgeting for the station; assisted in union and labor negotiations and in manpower allocation decisions; evaluated the profitability of program production, acquisition and scheduling changes; acted as interface with the CBS staff in New York on financial and planning matters; and was responsible for special projects and other strategic planning.

17. In June 1980, Ms. Jaramillo left WBBM-TV to accept a position at 20th Century Fox Television as the Executive Director of Marketing and Administration - Domestic Syndication. In that position she supervised the domestic syndication, sales administration, and booking distribution departments. Ms. Jaramillo left 20th Century in January 1981 and accepted a position with American Communications Industries as Vice President of Planning and Assistant to the Chairman, a position she held for about seven months.

18. At the time of the hearing Ms. Jaramillo was the general manager of WDZL(TV), Miami, Florida, which commenced operation in October 1982. She began her employment there in March 1982 overseeing the purchase of equipment, the construction of the station and the hiring of its staff. Once the station went on the air, Ms. Jaramillo undertook the overall management of the operation.

19. Ms. Jaramillo currently resides at 285 S. Tradewinds, Lauderdale-By-the-Sea, Florida. If SMJ Television Company is awarded the construction permit for Channel 61, she will move to Houston.

20. At the time of the B cut-off date in this proceeding, Ms. Jaramillo was the sole general partner, general manager, and 17.5 % owner of 39 Broadcasting, Ltd., which was the permittee of WDZL(TV). On June 30,

1982, the B cut-off date in this proceeding, SMJ's application was amended to report that if the construction permit for Channel 61 is awarded to SMJ, Ms. Jaramillo would dispose of her ownership interest in and resign from her position as general manager prior to the grant of program test authority. SMJ also represented that it would accept a grant conditioned upon the termination of Ms. Jaramillo's ownership, position as general manager, and other involvement with WDZL. As of June 1984 Ms. Jaramillo was no longer the station's general manager, and her general partnership interest had been converted to a limited partnership interest.[3]

Alliance Broadcasting Company, Ltd.

21. *Organizational Structure.* Alliance is a limited partnership. Its sole general partner, Alliance Broadcasting Corporation, is a Texas corporation. Each of the shareholders of the corporation is also a director. The ownership of the corporation is as follows:

	Percentage of Common Voting stock
JoAnn Watkins, President	8.0
J.T. Doke, Vice President	20.0
Charles W. Harrison	20.0
Calvin Murphy	20.0
Isabel Estrello Silvas	14.5
Joseph D. Atkinson, Jr.	15.0
Elayne Shochet Tatar, Secretary-Treasurer	2.5

22. By amendment dated October 14, 1983, Alliance reported purchases of and subscriptions to shares of the corporation's preferred nonvoting stock.[4] The offers to subscribe to said shares were accepted by the Alliance Board of Directors of September 27, 1983. The preferred nonvoting shareholders are as follows:

	Percentage of Preferred Nonvoting Stock
JoAnn Watkins	32.5
Charles W. Harris	32.5
Sheldon Weisfeld	9.3
Antonio Diaz, M.D.	9.3
Gustavo Stern, M.D.	9.3
Carver Henry	7.1

23. By an amendment filed May 23, 1984, Alliance, effectuating a merger previously approved by the Presiding Judge, reporting the formation of a new limited partnership known as Alliance Broadcasting

[3] *See* SMJ amendment filed June 22, 1984.

[4] This amendment was accepted by Order of the Presiding Judge released October 20, 1983 (FCC 83M-3741). Official Notice is taken of the information contained in this amendment and of the information contained in Alliance's amendment filed on May 23, 1984.

Company, Ltd., in which Alliance Broadcasting Corporation is the 50% General Partner and, with some exceptions, former principals of the dismissed applicants K-Ram Corporation and Third Coast Broadcasters, Inc. are limited partners. The limited partners of Alliance are as follows:

	Percentage of Interest of
Alliance Broadcasting Corporation	5.61
Naomi Andrews	1.61
Dr. Harvel Blackwell	0.87
The Robert Logan Clarke Trust	2.22
J.T. Doke	4.00
James D. Grant	1.00
Napoleon Johnson	1.09
Carolyn Jones	0.10
Ann Kaufman	0.11
Audrey Lawson	1.41
Elwyn Lee	0.12
Clara McLaughlin	11.38
Phillip Nezart	0.45
Dennis Reich	3.25
Claudette E. Sims	0.13
Garry Spire	3.25
Wells Stewart	1.71
Arturo Villalobos	2.94
Marcy B. West	8.75

24. *Other Broadcast Interests.* In Alliance, one of the preferred non-voting stockholders of the corporate general partner, and several of the limited partners, have ownership interests in other broadcast stations. These interests are as follows:

25. Carver Henry, is an 80% common stockholder in Bayou State Broadcasting Company, the licensee of WQCK(FM), Clinton, Louisiana. Henry acquired his ownership interest in WQCK(FM) in March of 1984. If the Alliance application is granted, Henry would divest his ownership interest in Bayou State Broadcasting Company and would sever all ties with that company.[5]

26. Clara J. McLaughlin is the President, a Director and 32.98% stockholder of KLMB-TV, Inc., a permittee of KLMG-TV, Longview, Texas, and KLPH-TV, Paris, Texas. In addition, KLMB-TV is the assignee of construction permits for KOAV-TV, Nacogdoches, Texas, and KLDS, Denison, Texas. If the Alliance application is granted, McLaughlin would divest herself of all her ownership interests in these four stations and would sever all ties with the permittees.

[5] Carver Henry is a preferred stockholder in Alliance's corporate general partner. The remaining broadcast interests described in the text are held by limited partners of Alliance.

27. Naomi Andrews is a 5% common stockholder in Frontier Gulf, Inc., the "tentative selectee" of a new low power television station in Houston, Texas. If the Alliance application is granted, Andrews would divest her ownership interest in Frontier Gulf and would sever all ties with the company.

28. Claudette E. Sims owns 10 shares of stock (less than 1%) in Capital Cities Communications, Inc. pursuant to an employee stock ownership plan. Capital Cities Communications, Inc. is the licensee of KTRK-TV, Houston, Texas. Sims is the manager of Community Services at KTRK-TV.

29. Garry Spire is a 3.8% shareholder in Response Broadcasting Corporation. Response has been granted construction permits for the following low power television stations: K49AV, Hermosa, Colorado; K45AM, Hermosa, Colorado; K69DO, Eastsound/Ferndale, Washington. On August 5, 1983, tentative Commission approval was granted for an assignment of television translator license K56AU (File No. BLTT-790928IA) from New Wave Corporation of Missouri to Response. Spire also holds 26.51% of the voting stock and 23.95% of the nonvoting stock of the Mad River Broadcasting Co., Inc., an applicant for a construction permit for a new commercial television station at Arcata, California. By Order released February 29, 1984 (FCC 84M-1029), the application was granted and on May 18, 1984, (FCC 84D-36), the Review Board denied an appeal by the sole competing applicant.

30. *Integration of Ownership and Management.* All of the voting stockholders of Alliance Broadcasting Corporation, the applicant's general partner, represent that they will work full-time at the station. All are local area residents with civic experience. The following is a summary of the relevant attributes of each stockholder.

31. JoAnn Watkins, an eight percent stockholder and president of Alliance, proposes to work full-time, at least 40 hours per week, as the general manager of the station. Watkins resides at Sugarland, Texas, which is adjacent to Houston and within the city grade contour of Alliance's proposed station. She has lived there since 1977 and has lived in the Houston metropolitan area for a total of 25 years. From 1968 to 1980, except for an interval of approximately 18 months, Watkins was employed as the business manager of an accounting firm in Houston, Texas. In June, 1980, the accounting firm was sold and from that year to the present, Watkins has been the Vice-President and 50% stockholder of the Watkins Management Company, an investment consulting firm located in Houston.

32. Since October 1981, Watkins has been the president and 50% owner of Peppermint Park Kiddieland, Houston, and since January 1982, the President and 50% owner of Party-On-Wheels, Inc., Houston. If the

Alliance application is granted, Watkins would terminate her employment at Watkins Management Company and would turn the day-to-day management of the Peppermint Park and Party-On-Wheels operations over to the present general manager. She is a member of the Memorial Baptist Church in Pasadena, Texas, and has been a member of the Stafford, Texas Parent Teachers' Organization.

33. J.T. Doke has resided in Houston continuously since 1962. He is of American Indian heritage. If the Alliance application is granted, he would serve as full-time chief engineer of the station. In this capacity, he would manage the technical operation of the station and would supervise the station's engineering and technical personnel. He would work at least 40 hours per week at the station and would report to the General Manager. As indicated above, he holds a 20% interest in Alliance as a general partner. Doke has a Bachelor of Science degree in Mechanical Engineering from the University of Oklahoma. He worked as an engineer at the U.S. Army Ballistic Missile Center in Huntsville, Alabama from 1958 to 1962 and from 1962 to March 1978 was employed as a project engineer at the Johnson Space Center, NASA, Houston, Texas. He served as Senior Project Engineer on the Apollo Program. Doke retired from government service in 1978.

34. From 1974 to 1980, Doke was a member of the Clear Lake Chamber of Commerce in Houston. He served on the Board of the Directors of the Chamber from 1970 to 1978. In the mid-1970's, he participated in founding the Houston Intertribal Council of American Indians. He continues to be a member of the Council which provides individual outreach programs to American Indians residing in the Houston area. If the Alliance application is granted, Doke would continue to devote time to civic activities in the Houston area, but only to an extent not inconsistent with his full-time employment obligations at the proposed station.

35. Charles W. Harrison is a 20% stockholder and a director of Alliance. A Houston resident since 1934, he proposes to work full-time, at least 40 hours a week, as director of public relations. Mr. Harrison testified that as the Director of Public Relations he will work to create an awareness of the station in the minds of the audience and general public. Tr. 213. He is a black male and has lived in Houston since 1934.

36. Harrison has been employed as the Director of Game Operations for the Harlem Globetrotters, Inc. since 1981. Prior to 1981 he was associated with the Globetrotters as a player, Public Relations Executive and coach. Since 1970, he has organized youth basketball clinics as part of the Houston Mayor's Summer Youth Program. Since 1971, he has been an active member of PULL, the Professional United Leadership League, a community service organization, and he has served as a volunteer worker

for the Neighborhood Centers Day Care Association, a United Way Agency. Since 1975, Mr. Harrison has volunteered his services, made guest appearances, and given presentations in the Houston area on behalf of The Heart Foundation, The National Association of Retarded Children, and The Sickle Cell Anemia Telethon.

37. Calvin Murphy is a 20% shareholder and a director of Alliance, and he is the station's proposed sports director. He will manage and supervise the production and presentation of sports programming, sports news, and the coverage of sporting events. He will devote at least 40 hours per week to this position. A black male, Murphy has resided in the city of Houston continuously since 1971. He has been a professional basketball player under contract to the Houston Rockets of the National Basketball Association. At the time of the hearing in this proceeding, he had one year remaining under his contract with the team.

38. Murphy holds a Bachelor of Arts degree in Sociology and is presently in the process of completing the requirements for a Master of Science degree in child psychology. Since 1975, Murphy has been a member of PULL, Professional United Leadership League in Houston. He has participated in various PULL sponsored activities, including the annual Christmas program at Texas Children's Hospital. Since 1975, he has been a sponsor of and a volunteer at Marching Thunder, Inc., a non-profit baton twirling instructional school that is affiliated with the Houston YMCA. Since 1975, he has also performed volunteer work for Hester House, a community service organization in Houston, and is active in the Houston Big Brother organization. In 1977, Murphy served as the honorary chairman of Cystic Fibrosis Foundation of the March of Dimes, Houston, and in 1982 he received an honorary Doctorate in the Art of Teaching from the Niagara University, New York.

39. Isabel Estrello Silvas is a 14.5% shareholder and director of Alliance. She proposes to work full-time at the station as the general sales manager. In this position she will supervise the local, regional and national sales staffs. Silvas is a woman of Hispanic heritage and has been a resident of Houston since June 1981. From 1971 to 1981, she resided in Clute, Texas, a community which is located approximately 50 miles from Houston, and which lies within the Grade B contour of the proposed station. From 1971 to 1981, Silvas was a delegate to the State convention of the Democratic Party from Brazoria County. She was also a member of St. Jerome's Catholic Church and its Ladies Auxiliary and the President of the Clute Parent Teachers Association. Silvas has also done volunteer work for the Clute Boy Scouts of America and the Clute Little League Association. In 1971 she organized a voter registration drive for the Hispanic residents of Brazoria County. Also in 1971 she served as a

member of the Planning and Zoning Board of Clute, Texas. Since 1981, she has been a member of the Houston Mexican-American Democrats.

40. Silvas is presently employed as the purchasing coordinator for the foods division of Coco Cola, Inc., and would terminate her employment there if the Alliance application is granted.

41. Joseph D. Atkinson, Jr., is a director and 15% shareholder of Alliance. He proposes to work full-time, at least 40 hours a week, at the station as the Equal Employment Opportunity Officer and community relations director. In this capacity, he will effectuate the station's equal employment opportunity program and arrange for the station to meet the needs of community organization.

42. Atkinson is a black male who has resided in the city of Houston since 1964. Since 1964 he has been employed by the federal government at the Johnson Space Center, NASA, in Houston. Since 1972, he has served as the chief Equal Opportunity Officer of the Center. If the Alliance application is granted, Atkinson would terminate his employment with the Johnson Space Center to work for the new station.

43. Atkinson has been a member of the Gulf Coast Alliance for Minorities in Engineering since 1979. He is presently a member of the Houston Citizens Chamber of Commerce and has been actively affiliated with the Chamber since 1979. Since 1980 he has been a member of the Houston chapter of the NAACP, and since 1974 he has been a member of the Willow Meadows Civic Club, a neighborhood association. Since 1974 he has also been a member of Trinity East United Methodist Church, Houston. For the past ten years, Atkinson has been active in the NASA Outreach Program, which sponsors presentations and activities for the Houston public school system and various community organizations for the purpose of encouraging students and other interested individuals to explore the fields of engineering and science.

44. Elayne Shochet Tatar is a 2.5% shareholder, who proposes to work full-time at the station as the program director. In this capacity, she will be responsible for the acquisition, production, and presentation of programs and program materials.

45. Mrs. Tatar currently resides in Houston and has lived there since 1968. She is a member of the State Bar of Texas, and has been a member of the Houston Bankruptcy Forum, the Houston Bar Association, and the Federal Bar Association. She is a member of the Congregation B'rith Shalom, Houston, the Sisterhood of Congregation B'rith Shalom, and a life member of the Hadassah, Houston. She is also an active member of the Houston Parent Teachers Association and has, for over 25 years, been a volunteer campaign worker and Section Captain for the American Cancer Society. From 1972 to 1975, Mrs. Tatar served as a Member of the Board of Trustees of the Houston Ballet Foundation and in 1982 and 1973

she chaired the Foundation's annual fund drive. In the late 1970's, she was a member of the Harris County Women's Political Caucus and served on the Caucus's Candidate Evaluation Committee. She was also a member of the Houston Museum of Fine Arts in the late 1970's. In 1975, Mrs. Tatar co-founded the Houston Area Feminist Federal Credit Union; and from 1975 through 1977 she chaired the Credit Union's Credit Committee. From 1975 through 1977, she was a member of the National Association for Gifted Children and has been a member of the West Maple Civic Association, a neighborhood organization, since 1969. In 1978, Mrs. Tatar was a delegate to both the Texas statewide Democratic Political Convention and the Harris County Democratic Political Convention. She also served as a Precinct Election Judge in Houston, 1979 and 1980.

46. *Specialized Programming.* Alliance intends to broadcast a program schedule consisting entirely of programs in the Spanish language, with some of the programs involving bilingual English/Spanish material. It would devote 14.3% of its broadcast time to local programming, and 6.1% to public affairs programs, 7.4% to news, and 3.6% to all other programs exclusive of entertainment and sports. Alliance Ex. No. 10, p. 1.

47. In support of its showing that there is a need for a Spanish language television station in Houston, Alliance submitted 1980 Census figures to show that the City of Houston has a total population of 1,595,138 persons, of which 281,331 (17.6%) are Hispanic, and that the Houston SMSA has a total population of 2,905,353 persons, of which 424,903 (14.6%) are Hispanic. Alliance Ex. 16 at 1. Alliance also submitted information from the 1980 Census showing that Spanish is the primary language spoken in the homes of 224,281 persons of ages five and over in the city of Houston. Of these persons, 63,315 persons do not speak English well or at all. In the Houston SMSA, Spanish is the primary language spoken in the homes of 332,752 persons of ages five and over, and 84,302 persons do not speak English well or at all. *Id.* According to the 1980 Census of Population, of the total population of the Houston Urbanized Area ages five and over (2,210,830), the total number of persons who speak English not well or not at all is 89,096, or 4.03%. *See* U.S. Department of Commerce, Bureau of the Census, *1980 Census of the Population*, Vol. 1, Ch. C, Part 45, Table 116 at 45-187. (Official notice taken).[6]

[6] In its "Definitions and Explanations of Subject Characteristics," Appendix B to the General Social and Economic Characteristics, Chapter C of the U.S. Census Bureau, *1980 Census of Population*, Vol. 1 Characteristics of the Population, Part 45 Texas at B-7 - B-8, the U.S. Census Bureau has indicated that the data on "Languages Spoken at Home and Ability to Speak English" was compiled from answers to questions that "were not intended to determine which language was a person's main language, or whether a person was fluent in the non-English language that he or she reported." The Bureau

48. Houston and its environs are presently served by seven television stations: KHOU-TV, KHTV, KTRK-TV, KTXH-TV, KUHT-TV, KPRC-TV and KRIV-TV. Following is a summary of the amount of Spanish language programming offered by these stations.[7]

49. Station KHOU-TV currently provides a local, half-hour weekly public affairs program call *Hola Amigos* on Sundays from 7:00-7:30 a.m., which deal with issues of particular interest to the Mexican-American community. The program is conducted in Spanish, unless the guest is not conversant in the language.

50. Station KHTV airs an English/Spanish bilingual program each week on Saturdays at 8:30 a.m. The program, *Cita Con Carlos*, is a half-hour variety program that includes interviews with community leaders addressing issues of importance to the Spanish community.

51. Station KTRK-TV broadcasts a 30-minute program once a month at noon on Saturdays call *Viva Houston*, which addresses the needs, interests and problems of the Houston Hispanic community. The program is generally broadcast in English, but occasionally Spanish language segments are included. KTRK-TV also broadcasts a program called *Mundo Real* once a month on Saturdays at 6:30 a.m. (occasionally at noon). The program is broadcast on an English/Spanish bilingual basis. *Villa Alegre*, a half-hour instructional program aimed at children and broadcast on a bilingual basis, is broadcast each Sunday morning at 6:30 a.m. on KTRK. News bulletins (such as weather and other information with respect to hurricanes) are generally broadcast in Spanish as well as in English.

52. Station KTXH-TV broadcasts a 30-minute English/Spanish bilingual educational program for children Tuesday through Thursday at 5:00 a.m. The station also broadcasts two public affairs Spanish/English bilingual programs: *Sonrisas* and *Que Pasa, U.S.A. Sonrisas* airs weekly each Saturday for 30 minutes at 5:30 a.m. and is a dramatic series aimed at Hispanic children ages 7-11 that deals with social problems, such as death, alcoholism, teenage love and ecology, and shows how problems such as these affect the Hispanic Community. That cast is all Hispanic. *Que Pasa, U.S.A.* is a bilingual situation comedy series depicting three generations of a Cuban-American family. The program airs weekly for 30 minutes at 5:00 a.m. on Saturdays.

53. Station KUHT, a non-commercial educational television station licensed to the University of Houston, broadcasts two programs which are English/Spanish bilingual. *Hablamos Espanol*, is a series of thirty-eight (38) thirty-minute (30) English/Spanish language instructional programs

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cautioned that the responses to the question asking a respondent to characterize his or her ability to speak English "were extremely subjective."

[7] Unless otherwise noted, the stations referred to are commercial.

designed to stimulate interest in the Spanish language and culture. As part of the instructional schedule of KUHT, each program of the series airs on Monday at 11:00 a.m. and 1:45 p.m. and on Tuesday at 8:30 a.m. *New Visions/Nuevas* is a locally-produced weekly program series covering events of interest to the local Hispanic community. These English/Spanish bilingual programs are public affairs offerings of the station and air at 7:30 p.m. on Tuesday. Each program is thirty minutes (30) in length.

54. Station KPRC-TV carries three English/Spanish bilingual programs: *Reflejos del Barrio* is a local public affairs series broadcast weekly at 12:00 noon at Saturday. The half-hour program is a talk-information series, including film and video tape inserts of community news and events. *Latin Tempo* is a recorded news/public affairs series broadcast weekly on Saturday at 12:30 p.m. The series cover national news affecting the Hispanic community and includes interviews with newsmakers in the Hispanic community. *Bravissimo* is a one-hour entertainment special seen once a month on Saturday or Sunday afternoon. The syndicated series features Hispanic performers from the performing arts and professional and amateur sports. In addition, KPRC-TV has for several years fed a Spanish translation of the station's 10:00 p.m. news to a local radio station so that listeners will have a Spanish translation to explain the video portions of KPRC-TV's news. The program is 30 minutes in length and airs on weekdays, Monday-Friday.

55. Station KRIV-TV, broadcasts five hours of regularly-scheduled Spanish language programming per week. The programming is carried each weekday evening, Monday through Friday, from 12:00 midnight to 1:00 a.m. These programs are mostly "novelas," supplied to the station by SIN. KRIV-TV also carries a program, *Herencia,* that is directed to Houston's Hispanic community and is occasionally conducted bilingually. It is a locally-produced program which airs Sunday nights from 9:30 to 10:00 p.m.

Urban Broadcasting Systems

56. Urban Broadcasting Systems (Urban) is a California limited partnership. Charles Edward Walker is the sole general partner of Urban, and he is also one of three limited partners. Mr. Walker owns a total of 47% of the equity of Urban (25% as general partner and 22% as a limited partner). The other two limited partners are Barnett J. W. Grier, Jr., who holds a 4% interest and DHL Broadcasting Company, which holds a 49% interest.

57. As general partner, Mr. Walker will have full control of the operation and management of the proposed station. He will hire all management personnel and will work full-time (40 hours per week) at the station. Mr. Walker is a black male, born in Texarkana, Arkansas. He

currently resides in Sherman Oaks, California. Upon grant of the Urban application, Mr. Walker will move to and become a resident of the City of Houston, Texas. He has been active in a number of civic organizations in the Los Angeles area and expects to continue such activities in the Houston area should he be successful in this proceeding.

58. Mr. Walker has considerable experience in business directly related to television broadcasting and programming. He is currently a free-lance director and producer of television and non-television films. He is also a consultant to Avandi II Productions, Inc. (Avandi), which produces films for television and non-television use. Mr. Walker began consulting work for Avandi in December of 1982 and from June 1982 until July 1983 he was also Staff Producer, Director, and Vice-President of Production. Mr. Walker will terminate his position with Avandi upon grant of Urban's application.

59. In addition to his work with Avandi, Mr. Walker has participated in television and theatrical productions as a Unit Production Manager, Producer, Writer, and/or Director. Among them are the following: Director for film entitled "Going For the Gold," a 20-minute, 16mm film for public service use in grades seven through twelve, to be shown in public schools throughout Los Angeles and Orange Counties (1983); First Assistant Director of a one-hour show for the Department of Education entitled "Jobs," produced by Rainbow Productions in Hollywood, California (1982); 3 half-hour episodes of "Apple Dumpling Gang" - Walt Disney Productions - DGA, 1st Assistant Director (1982); "Gilligan's Island" (2-hr. pilot for NBC), Unit Production Manager (1982); "Buck Rogers," 6 episodes, "2nd Unit Directing 1 episode" (1980; 8 episodes of "House Calls" (1979; "Harris & Company," 4 episodes, NBC, 2nd Unit Directing (1979); "Nat'l Lampoon's Animal House" (ABC Pilot, 1978); Universal Studios - Unit Production Manager, "The Bionic Woman: (1977-1978); Universal Studios "Quincy" (7 episodes, 1977; Universal Studios - Unit Manager and 1st Assistant Director, "Nancy Drew" (4 episodes, 1977); Universal Studios - 1st Assistant Director, "Columbo" (1976); Lorimar Productions - 1st Assistant Director, "Blue Knight," (1974); Lorimar Productions - 1st Assistant Director, "Waltons" (1973).

60. Mr. Walker's work has been recognized and commended by the film industry. In February 1973, as Assistant Director, he received the "Directors Guild of America Award" for best television direction on the "Marcus Nelson Murders, " the pilot for the "Kojak" television series, directed by Joseph Sergent.

61. Neither Urban, Charles E. Walker nor the limited partners of Urban owns nor has any interest in any broadcast stations, publications, cable television systems or any other medium of mass communications. Charles E. Walker is a limited partner (27.5% equity interest) in A & R

Broadcasting (A & R), an applicant for a new television station to operate on Channel 30 at San Bernardino, California (BPCT-830506KM). Exhibit 1 to the A & R applications states that: "[i]n the event the application of Urban Broadcasting Systems for a new television station at Houston, Texas, is finally granted, Mr. Walker will dispose of all interests he has in the application for or any authorization for Channel 30 in San Bernardino, California."

Findings of Fact (Basic Qualifications)

Houston Family Television, Ltd.

62. The potentially disqualifying issues specified against Family are set forth in the Preliminary Statement (para. 4 *supra*). In brief, they involve site availability, Section 1.65 violations, misrepresentation and ineptness. From a factual standpoint, the issues are intertwined and revolve primarily around Family's difficulties in securing an antenna site.

63. Family engaged Sterling Communications, Inc. (Sterling) to assist it in preparing its application. Sterling retained B. Scott Baxter to prepare the engineering. According to the testimony, the applicant's original intent was to locate its antenna on the Texas Commerce Tower.

64. In late March or early April 1982, Richard Holgin, Family's general partner, visited Leonard Rodell, the Assistant property Manager of Gerald Hines Interests (Hines), to inquire as to a potential transmitter site. Hines manages both the Post Oak Tower and Texas Commerce Tower. On April 14, 1982 Mr. Rodell addressed a letter to Mr. Holgin, in care of Sterling, stating that Hines would consider leasing space for a transmitter site if mutually agreeable terms could be reached, there being, however, no obligation to lease space to Family even if it were to become a Commission licensee. Family Ex. 4 at 4-5. The letter mentions no specific building but the letterhead includes a reference to "Texas Commerce Tower in United Energy Plaza."

65. In May 1982, Mr. Holgin received a copy of the completed application from Sterling and Mr. Baxter. Family Ex. 4 at 6; Tr. 402. The application contained an engineering exhibit, Exhibit E-7, which included an antenna vertical sketch showing an antenna of approximately 40 feet in height. Urban Ex. 12, p. 7. The antenna vertical sketch named the building upon which the antenna was to be mounted as "Post Oak Tower." Mr. Holgin did not understand engineering terms which appears on the sketch, but he did understand that the sketch depicted Family's proposed transmitter atop the Post Oak Tower. He reviewed the engineering statement but did not question Sterling's identification of the building. Tr. 421-23. In Mr. Baxter's technical report accompanying the application, the Post Oak Tower was mentioned twice, but these references apparently raised no question in Mr. Holgin's mind as to the building upon which

Family was proposing to place its antenna. Tr. 424.[8]

66. Mr. Holgin received a copy of an FAA form with the application in May 1982. He was sure he looked over the FAA form and had seen, under the description of the site location, "Atop Post Oak Tower in downtown Houson . . . ." When he saw the description, he saw nothing wrong with it and assumed the entry was correct. Urban Ex. 18; Tr. 452-55.

67. Mr. James E. Price, Vice President of Sterling, prepared work notes dated May 4, 1982 and sent them to Mr. Baxter for preparation of the engineering of the Family application. Family Ex. 8; Tr. 1148. The notes consisted of a handwritten copy of the first two pages of Section V-C of FCC form 310; a copy of Gerald D. Hines Interests' land mobile license; a vertical sketch; and a reproduction of a portion of the Settagast, Texas, USGS topographic map. Family Ex. 8. The attached first page of Section V-C of FCC Form 301 (Item 4) gave the transmitter location as 2100 Post Oak Tower. The information contained in the work notes was received by Sterling from James D. Moore, Jr. Tr. 1150. Mr. Moore helped put the Family application together, and Mr. Holgin processed information through Mr. Moore to Sterling. Tr. 473.

68. Mr. Price testified that two FAA notices, dated May 25 and July 9, 1982, respectively, had concluded that any height exceeding 1049 feet AMSL would constitute a hazard to air navigation. Family Ex. 9; Tr. 1158. On June 21, 1982, he wrote to Mr. Holgin mentioning, among other matters, that the ability of the penthouse of the Post Oak Tower site to support the proposed antenna structure and the availability of the site might be challenged by Family's opponents. In addition he noted that "some opposition" had been received from the FAA regarding the proposed antenna structure. Urban Ex. 27. Holgin took no action in response to this letter. Tr. 475-77.

69. In a memorandum dated July 29, 1982, Mr. Price told Mr. Abe Thiessen, also a Sterling official, that Scott Baxter had called regarding an FAA problem with the Family application. According to Mr. Baxter, the FAA had limited the height of any structure on the Post Oak Tower to 1001 feet AGL and 1049 feet AMSL. In order to file the necessary amendment, Baxter needed the actual height of the building, which seemed to be at variance with the information supplied by James Moore, Jr. A notation on the memorandum, dated August 6, 1982, indicated that Mr. Moore was getting the information. Urban Ex. 25. In a handwritten note dated August 5, 1982, Mr. Thiessen wrote that Moore confirmed in a telephone conversation that the building data he had furnished was "not right." Urban Ex. 26.

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[8] Mr. Holgin, a lifelong resident of Houston, is familiar with a building known as Post Oak Tower. He knew the Post Oak Tower to be 300 to 400 feet in height and the Texas Commerce Tower to be over 1,000 feet tall. Tr. 419-420.

70. In August 1982, at the request of Mr. Moore, Richard Holgin contacted David Schenkel and another individual of the building management of the Post Oak Tower. Moore wanted information about the Post Oak Tower, including its height and what was on top of the building. Mr. Holgin did not inquire into the purpose of the request. Tr. 458-59.[9] Holgin told Mr. Schenkel and his associate that someone wanted to put an antenna on top of the Post Oak Tower and may also have asked if a television tower or transmitter could be placed on the building. Tr. 463-64. By letter dated August 10, 1982, Holgin, pursuant to Moore's instructions, sent the Post Oak Tower information to Mr. Price of Sterling, including two photographs of the building, furnishing copies to Messrs. Thornton, Garza and Moore.[10] Family Ex. 4; Tr. 463, 1185.

71. Curiously, Mr. Holgin maintains that this contract with the Post Oak Tower building management officials was not made on behalf of Family. Tr. 460-463. Holgin does not send copies of all of his correspondence to his partners; and normally he does not send copies to Mr. Moore. Rather, his normal practice was to send copies of correspondence to his partners only if it involved important matters of which they should be aware. Holgin thought his partners should have the information on the Post Oak Tower, and he signed the letter as general partner of Family. Nevertheless, he insisted it had "no bearing on the [Family] application whatsoever." Tr. 460-462.

72. On August 13, 1982, Abe Thiessen wrote to Mr. Baxter in connection with the latter's phone call of July 28 (para. 69 *supra*). Enclosed was a letter from Schenkel, the property manager of the Post Oak Tower, giving the information and attaching two photographs of the Post Oak Tower which had been sent to Sterling by Mr. Holgin. Urban Ex. 14. Mr. Thiessen later made a notation across his copy of the August 13 letter, stating, "8-23-82 Reported to Jim Price 1060 vs 299!!!" (apparently a reference to the height of the two buildings). Later, on about September 9, 1982, Mr. Thiessen had a telephone conversation with Mr. Moore during which Moore told him to change Family's proposed transmitter site from the Post Oak Tower to the taller building, the Texas Commerce Tower, and re-engineer the proposal. Urban Ex. 29; Tr. 1020.

73. Meanwhile, Mr. Holgin again contacted representatives of the Gerald Hines Interests, this time about the Texas Commerce Tower. Tr. 474, 476. On August 16, 1982, Farrell D. Hays. Property Manager of the Texas Commerce Tower, wrote to Mr. Holgin telling him that Hines had

[9] In an affidavit filed December 22, 1982, Holgin had stated that before the Family application was filed he had spoken with the Post Oak Tower management about placing an antenna atop the building. In his written testimony he conceded that it was this August 1982 contract with Mr. Schenkel he had in mind. Family Ex. 4 at 47.

[10] Thornton and Garza are Family limited partners.

decided to proceed to lease space for antennas. He enclosed a list of information requirements they needed in order to proceed with the design, and asked him to return them before September 15, 1982. Family Ex. 4 at 11, 31. On August 24, 1982, Mr. Holgin forwarded the letter to Mr. Price of Sterling, saying that it requested only survey information and had "nothing to do with our application or our antenna." *Id.* at 13.

74. He testified that he regarded the Hays letter as simply a survey request, "just gathering information at the time. . . ." Tr. 488. Later Family submitted the Hays letter as documentation of the availability of the transmitter site. Tr. 489. On September 28, 1982, Mr. Price sent the survey information to Hays and requested additional information about the building. Family Ex. 4, p. 15.

75. In November 1982, Family's communications counsel forwarded copies of enlargement petitions filed on November 5 by DHL and K-RAM alleging that Family did not have access to the Post Oak Tower for its antenna site. Family Ex. 4 at 17. Mr. Holgin said he recognized that something had to be done about the engineering and directed his communications counsel to instruct Scott Baxter to amend the engineering portions of the Family application. Family Ex. 4 at 17. Holgin claimed that "he realized for the first time that Family's application contained references to the Post Oak Tower" when he received the motions to enlarge issues. Family Ex. 4 at 17.

76. On December 27, 1982, Family's communications counsel advised Mr. Holgin that Tom Cope, a property management employee at the Texas Commerce Tower, and informed Mr. Baxter that any antennas Family put on top of the Texas Commerce Tower could not exceed eight feet in height above the roof. *Id.* at 17. Family proceeded, however, with its efforts to move to the site, and on January 7, 1983, an amendment was filed which, in part, eliminated the references to the Post Oak Tower and specified the Texas Commerce Tower as the proposed site. This amendment was accepted by *Order* (FCC 83M-783), released March 8, 1983. In the meantime, on February 3, 1983, a petition to enlarge issues was filed questioning Family's right to use the Texas Commerce Tower and claiming that Texas Commerce Tower property management personnel had informed Family on December 15, 1982, that it could not use the Texas Commerce Tower as its transmitter site. Mr. Holgin claimed that neither he nor his partners had received any such notification (Family Ex. 4 at 17-19); but in any event on February 25, 1983, Ben Franklin III, an employee on the management staff of the Texas Commerce Tower, telephoned Mr. Holgin to tell him that Family could not use the Texas Commerce Tower because the antenna exceeded the eight-foot height limitation. That conversation was confirmed by letter dated March 4, 1983, to Mr. Holgin. Family Ex. 4 at 19-22; Tr. 496. On March 19, 1983, Family

informed the Commission of the loss of the Texas Commerce Tower as an antenna site. Family Ex. 4 at 22.

77. A site availability issue, among others, was designated against Family by *Memorandum Opinion and Order* (FCC 83M-1249), released April 15, 1983. On May 23, 1983, Family filed a motion for leave to amend to specify a new transmitter site — the third in twelve months.[11] This time the site proposed was in the Knight-Almeda subdivision, the same site proposed by DHL, at the time another applicant in the proceeding. On the same day the amendment was filed, Mr. Holgin wrote to Janet Musselman, the daughter of the trustee of the new site, concerning its possible use by Family. Family Ex. 5; Tr. 498. On May 31, 1983, Ms. Musselman executed an affidavit (Tr. 499-500) which led Holgin to conclude that the trustees of the land were under a contractual "obligation to DHL, and that they will enter into an agreement to have [DHL] use the land, and other than that, they're sure not to let anybody else use." Tr. 501. Mr. Knight, who was trustee for the property and whose company acted as agent for the owners, confirmed the information contained in Ms. Musselman's affidavit executed on May 31. Tr. 502.

78. The affidavits admittedly raised a question in Mr. Holgin's mind as to whether the property was in fact available to Family. He never got in touch with either Ms. Musselman or Mr. Knight to follow up on the matter, nor did he direct his agents to do so. Tr. 502-503. Despite Mr. Holgin's understanding that the site was not available to Family, the May 23 amendment was not withdrawn, and a further site availability issue was designated by *Memorandum Opinion and Order* (FCC 83M-2838), released August 23, 1983. The issue was tried in mid-October, during which the evidence described in this and the proceeding paragraphs was received. On January 9, 1984, Family attempted to amend its application to specify a fourth site, the KPRC-TV tower. The Presiding Judge denied the motion for leave to amend (FCC 84M-730, released February 13, 1984).

Alliance Broadcasting Co. Ltd.

79. *Harrison Misrepresentation Issue.* This issue involves Alliance's principal Charles W. Harrison. On June 2, 1972, in the County Criminal Court of Harris County, Texas, Harrison pleaded guilty to driving while intoxicated. He was fined $100 and placed on probation for a period of one year. Urban Ex. No. 8. Harrison then signed a document for the clerk of the court in which he stated under oath:

> (1) That he had never before been convicted in this or any other jurisdiction of a felony or a misdemeanor for which the maximum punishment is by confinement in jail or exceeds a $200.00 fine;

[11] The Presiding Judge accepted the amendment by *Order* (FCC 83M-2375), released July 28, 1983.

(2) That he has not been granted probation nor been under probation under the Misdemeanor Probation Act of Texas, or any other Act, in the preceding five years. (Urban Ex. No. 9)

In fact, Harrison had been convicted of a felony in the State of Texas on November 24, 1965, and had been fined $2,000 and placed on probation for five years.[12] Urban Ex. No. 10.

80. Prior to going to court on June 2, 1982, Harrison went to the office of his attorney and, shortly thereafter the two walked to the courthouse, a few blocks away. When his case was called, the attorney spoke on his behalf. After the Court ruled, Harrison followed his lawyer to a desk where he was told by the lawyer to write a check and to sign a document. Harrison believes that the document he signed at this time was the affidavit containing the incorrect statement concerning his conviction and probation. After signing the document, he and his attorney left the building together. During this entire time, he spoke to no one and did nothing but follow his attorney's instructions. Tr. 201-203.

81. Harrison did not read the document containing the incorrect statements at the time he signed it. He explained that in signing the document he was relying on his counsel's advice. He had known his attorney all his life and had gone to school with him. Moreover, his attorney was familiar with his prior conviction for a felony. Harrison testified that at the time he signed the statement at the courthouse he had no intention of making a false statement and that when he left the courthouse he had no idea that he had made a false statement. Tr. 204-5.

82. *Legal Qualifications and Alleged Misrepresentation.* In adding issues on the legal qualifications of Alliance and possible misrepresentations as to its corporate structure, the Presiding Judge relied on statements contained in a petition to enlarge that Alliance had misrepresented its corporate structure by placing the designation "(VS)" next to the name of its principals to indicate that each owned a specific percentage of voting stock in the corporation. The enlargement petition claimed that, in fact, "none of the persons listed in Alliance's application is the holder of any voting stock in the corporation." Moreover, the petition alleged that none of Alliance's voting stock has been subscribed, no stock has been issued, and at the time of taking depositions in this case, only one principal, Elayne Tatar, had signed a stock subscription agreement.[13] Based on these claims and, perhaps more importantly, Alliance's failure to oppose the petition, issues were added to determine whether Alliance is legally qualified and whether it misrepresented its legal structure in its

[12] His offense was the unlawful possession of narcotics without having paid the transfer tax. Urban Ex. No. 10.

[13] During the time in question, the applicant was a corporation; later it became a limited partnership, the corporation becoming the general partner. Findings, para. 23.

application or failed to comply with Sections 73.3513 and 75.3134 of the Rules.

83. Alliance Broadcasting Corporation was incorporated under the laws of the state of Texas on April 2, 1982 for the purpose of applying for and operating a commercial television station to serve Houston, Texas. The corporation has, since its incorporation, been in good standing and is fully qualified to transact business in the state of Texas. Alliance Ex. 15, p. 2.

84. Section II of the Commission's Form 301 seeks information on the legal qualifications of applicants for broadcast facilities. The instructions for Table I of Section II, which calls for information on "Parties to the Application," specify, in pertinent part, that information is to be provided "as to all persons or entities who are the beneficial or record owners of or have the right to vote capital stock, membership or owner interests *or are subscribers to such interest.*" (Emphasis supplied.) The information called for by Table I includes the name and residence of each principal, any office held, whether the principal is a director or member of the applicant's governing board, and the percentage of the ownership, partnership, voting stock or membership owned. If the interest is in voting stock, the letters "VS" are to follow the percentage of interest shown.

85. Alliance's original application, filed May 10, 1982, reflected the interests and principals of Alliance to be as follows:

	Percentage of Ownership
JoAnn Watkins, President	30.00 (VS)
Bobby B. Watkins, Vice President	2.50 (VS)
Margaret R. Wells Diaz	25.00 (VS)
J.T. Doke	20.00 (VS)
Charles W. Harrison	20.00 (VS)
Elayne Tatar, Secretary-Treasurer	2.50 (VS)

Subsequently, by amendment dated June 25, 1982, and filed June 30, 1982, Alliance amended its application to reflect that its owners and officers were as follows:

	Percentage of Ownership
JoAnn Watkins, President	8.00 (VS)
J. T. Doke, Vice President	20.00 (VS)
Charles W. Harrison	20.00 (VS)
Calvin Murphy	20.00 (VS)
Isabel Estrello Silvas	14.50 (VS)
Joseph D. Atkinson, Jr.	15.00 (VS)
Elayne Tatar, Secretary-Treasurer	2.50 (VS)

In addition, the original application and the amendment thereto indicated that each of Alliance's principals is also a director of the applicant.

86. The application form does not call for applicants to distinguish between corporate principals who are stockholders and principals who are stock subscribers. The designation "(VS)" was placed adjacent to the name of each principal to indicate that each principal was committed to be a subscriber for, and eventually the holder of, the stated percentage of Alliance common voting stock. Alliance Ex. No. 15, P. 1.

87. In 1982, when each of the principals agreed to join Alliance and to participate in its application for a television station, each understood that he or she was agreeing to purchase and to pay for shares of the common stock of the corporation. In addition, each of the principals subsequently (in January 1983) signed a subscription agreement confirming his or her obligation to buy shares equal to the percentage interest in Alliance as reflected in Alliance's application, as amended. In the same document, each principal also agreed to make loans to the corporation. Finally, as of the time of the hearing, each of the principals had made a partial payment (20%) under his or her subscription agreement. Alliance Ex. No. 15, pp. 6-20.[14]

88. Initially, the principals of Alliance conducted their business by communicating with one another by telephone or at informal meetings. Through these means, each of the principals was kept informed of the status of the application and gave his or her approval to the business decisions made on behalf of the corporation. Tr. 755-6, 841, 844. Alliance's Secretary-Treasurer, Elayne Tatar, took notes of the informal meetings, which were provided to local counsel for use in drafting minutes of the meetings. Tr. 973-4.

89. In September 1983, each of the stockholders and directors signed statements confirming that they unanimously "approved adopt and

[14] This result was achieved only after repeated warnings by Alliance counsel during late 1982 that if stock and loan subscriptions were not signed and cash payments to the corporation not made, the applicant's *bona fides* might be challenged by its opponents in the hearing.

consent to" all the actions taken in prior meetings of the stockholders and directors of Alliance. Alliance Exs. 17-27.

90. Alliance's decision to obtain authorization for 10,000 shares of preferred stock was made at a special meeting of the Board of Directors on October 15, 1982. On November 12, 1982, Alliance amended its Articles of Incorporation, filed with the State of Texas, to reflect the authorized preferred stock. The decision to arrange for preferred stock was consented to and approved by each of Alliance's principals. Alliance Exs. 22 and 23.

91. Each principal of Alliance has agreed to enter into the limited partnership (Alliance Broadcasting Co., Ltd.) in which Alliance (Alliance Broadcasting Corporation, the original applicant) would own a 50% interest. Tr. 824. Each principal was personally told by Watkins that, as a result of the merger, all the principals would have their equity interest reduced by one half. Tr. 826.

Conclusions

Disqualifying Issues (Family)

92. *Site Availability.* In the course of this proceeding, Family has specified four different antenna sites: Post Oak Tower, Texas Commerce Tower, a site in the Knight-Almeda subdivision and finally a location on the KPRC-TV tower in Houston. The first two proposals were amended by Family, and the last was the subject of a petition for leave to amend that was denied by the presiding officer. FCC 84M-730, released February 13, 1984. The site availability issue thus pertains to the Knight-Almeda subdivision proposal. The findings (paras. 77-78) clearly show that Family has no assurance that the site is available to it and never had such assurance. There is, on the contrary, a clear inference that the site will not be available, and Family's Richard Holgin admitted as much at the hearing. Thus, Family cannot be held qualified to receive a construction permit. *Shoblom Broadcasting, Inc.*, 95 FCC 2d 444 (Rev. Bd. 1983).

93. *Related Issues: Misrepresentation/Ineptness/Section 1.65 Violations.*[15] The specification of a site in an application is an implied representation by the applicant that that site is available to it. *William F. Wallace*, 49 FCC 2d 1424, (1974). Here, Family did not even make an inquiry regarding the Knight-Almeda site until the very day its amendment was filed specifying the site. The inquiry was made by letter, and as Mr. Holgin subsequently learned, the owners were not prepared to make the site available. Findings, paras. 77-78. Moreover, this is not the only instance where Family specified a site without reasonable assurance that

[15] The Section 1.65 issue has been submerged by other matters. It is noted, however, that Family did not apprise the Commission in a timely manner of changes in the status of the Post Oak Tower and Knight-Almeda site proposals.

it would be available for the proposed purpose. Family originally specified the rooftop of a building known as the Post Oak Tower. Though its application was filed in May 1982, Holgin stated that he did not contact the management of the building regarding an antenna site until August of that year. Findings, para. 70, n. 9. As to its second site, the Texas Commerce Tower which was specified in an amendment tendered on January 7, 1983, it is unclear what if any assurance was received that it would be available. However, as early as December 27, 1982, Family was on notice that any tower placed on top of the building could not exceed eight feet in height, Findings, para. 76.[16] And even before its amendment was accepted, Family had been notified by the management of the Texas Commerce Tower that the building could not be used as a transmitter site because of the height limitation. Findings, para. 76.

94. In sum, it is clear that Family had no reasonable assurance that it could utilize the Post Oak Tower or the Knight-Almeda subdivision when it specified these sites. As to the Texas Commerce Tower, when Family first formally proposed the site in January 1983 it had ample reason to believe its proposal would not be acceptable to the owner of the building, and this was confirmed by subsequent developments.

95. Under the standard set forth in *Wallace, supra*, it is clear that Family has engaged in misrepresentations regarding its antenna sites. However, there is no direct evidence of a willful and calculated effort to deceive, and having observed Mr. Holgin's demeanor and carefully examined his testimony, the presiding officer is reluctant to reach such a conclusion. Instead, Family's difficulties appear to stem from gross carelessness and ineptitude in the prosecution of its application. The presiding officer accepts Family's explanation that specification of the Post Oak Tower in the original application (rather than the Texas Commerce Tower) was the result of a mistake or series of mistakes. But why so egregious an error went uncorrected until the availability of the site was challenged six months later is difficult to understand in view of Holgin's familiarity with the application and with the two buildings. Findings, para. 65. From that point on, Family engaged in a desperate effort to salvage the application. Its proposals to use the Texas Commerce Tower and the Knight-Almeda were seemingly based on little more than rash and, as it turned out, unwarranted assumptions. Though misrepresentation may not have been intended, the errors of judgment and casual disregard for the viability of the proposals being submitted reflect a lack of care and good faith that is highly damaging to Family's qualifications. The Commission has a right to expect more from one who seeks a valuable franchise. Consequently, a comparative demerit of major proportions will be assessed, one which would effectively remove Family from further

[16] Family was apparently proposing a 40-foot tower. Findings, para. 65.

consideration in this proceeding were it not already disqualified under the site availability issue.

Disqualifying Issues (Alliance)

96. *Harrison's Misrepresentation.* As set forth in the findings (paras. 79-81), on June 2, 1972, Alliance principal Charles Harrison was found guilty of driving while intoxicated and was fined and placed on probation. At his court appearance, Harrison signed a sworn statement for submission to the court in support of his application for probation which stated, *inter alia,* that he had never been convicted of a felony and that he had not been on probation in the preceding five years. In fact, Harrison had been convicted of a felony in 1965 and had been on probation for part of the preceding five years. Harrison explained, and his testimony was not disputed, that at the time he signed the document containing the misstatements he did not read the document, but that he signed it on the advice of his counsel, an attorney who was fully aware of Harrison's prior conviction.

97. Harrison obviously erred in not examining the document more closely, and his conduct cannot be condoned. But as an indicator of his future performance in broadcasting, the incident is of little significance. In the setting described, his reliance on counsel was understandable, albeit misplaced, and there appears to have been no intent to deceive. Further, the incident was an isolated event which occurred 12 years ago and was entirely unrelated to broadcasting. (In connection with the latter consideration, it is noted that the felony conviction *was* reported to the Commission in Alliance's application. See FCC 83M-661, released February 25, 1983). In view of the foregoing it is concluded that the matter is of no decisional significance and that a demerit against Alliance is unwarranted.

98. *Legal Qualifications/Misrepresentation.* As noted in the findings, these issues relate to Alliance's legal qualifications and alleged misrepresentations to the Commission relating to its structure. Urban, the applicant which has pursued this issue most energetically, contends that at the time Alliance filed its application and for some time thereafter, it was merely a loose association of individuals and that the application and various amendments filed thereafter relating to ownership of the corporations were misrepresentations because the individuals named therein were not, in fact, owners.

99. Alliance was duly incorporated under Texas law on April 2, 1982, more than a month before its application was filed, and has been in good standing ever since. The presiding officer concludes that Alliance, then and is presently constituted, is legally qualified to receive a grant. With respect to the allegations of misrepresentation, the thrust of Urban's

argument is that the "owners" were merely stock subscribers and that the structure of the organization was so inchoate that accurate representations regarding its officers and ownership could not have been made.

100. The Commission's application form requires an applicant to set forth the percentage of ownership interest held by each of its principals. If the applicant is a corporation, and the ownership interests are therefore in voting stock, the letters "VS" are to follow the percentages shown.[17] The form does not require applicants to distinguish between corporate principals who are stockholders and those who are stock subscribers. Thus, even though Alliance's principals did not own any stock at the time the application was filed, they had reportable voting stock interests to the extent that they had subscribed to stock in Alliance. The record shows that the Alliance common stockholders understood at the time each of them agreed to participate that they were agreeing to purchase and to pay for shares of the common stock of the corporation. While these agreements were for the most part oral, each of the individual principals subsequently affirmed in writing his or her commitment to purchase shares equivalent to the percentage shown in Alliance's application, as amended. Moreover, each of the principals has made a full or part payment under his or her subscription agreement. Findings, para. 87.

101. While it is true that, at the time of the hearing, the actual stock in Alliance had not been issued, no Commission rule or policy has been cited which requires that capital stock be issued before an applicant corporation can be found qualified. The issuance of stock is of no real significance in the context of comparative proceedings since no distinctions are normally made between stockholders and stock subscribers. The record also reflects that, initially, the business of Alliance was conducted informally, but this is the case with many corporate applicants whose stock is closely held. Again, there is no Commission requirement that a corporate applicant follow any specific procedures in conducting its business. Here, all of Alliance's principals were kept informed of corporate business and their approval was obtained on major corporate decisions. Furthermore, each of Alliance's principals has affirmed in writing the actions of its board of directors and actions taken at stockholders meetings. Findings, paras. 88-91.

102. It is, therefore, concluded that Alliance's application correctly reflected its corporate structure, that Alliance made no misrepresentations concerning its structure in the application, and that it is legally qualified in all respects. Therefore, the issues are resolved in favor of

[17] The only other symbols which the applicant is asked to use are "O" for ownership, "P" for partnership, and "M" for membership.

Alliance.[18]

Comparative Issue

103. Family has been found disqualified because it lacks a transmitter site. It has also received a most serious demerit because of the lack of care and responsibility shown in connection with the various antenna site proposals submitted during the course of this proceeding. The applicant thus has no chance of success against the remaining parties, each of whom is basically qualified and without serious comparative drawbacks. According, this comparison will be confined to the applications of SMJ, Alliance and Urban.

104. *Diversification.* The applicants are almost equal. SMJ's sole stockholder, Susan Jaramillo holds a substantial interest in the permittee of UHF television station WDZL(TV), Miami, Florida but has made a timely commitment to dispose of this interest if SMJ's application is granted. Neither Urban's general partner, Charles E. Walker, nor its limited partners, owns any interest in any medium of communications.

105. Alliance's general partner, Alliance Broadcasting Corporation, has no media ownership interests. However, one of its preferred (non-voting) stockholders and several of Alliance's limited partners hold ownership interests in several broadcast entities. These are set forth in the findings, paras. 25-29; and most of them are subject to the same kind of divestiture commitment made by SMJ. Several, however, are at least arguably cognizable under the diversification standard. Garry Spire's broadcast interests described in par. 29 of the findings must be attributed to Alliance. Since Spire holds a mere 3.25% limited partnership interest in the applicant, this interest is only of slight weight and its significance is further diminished by the nature of the interests themselves: a 26.5% interest in a VHF television permittee in Arcata, California, and a 3.8% interest in a corporation which holds three low power television permits and a translator license, all of which are for communities many miles from Houston. In addition, Carver Henry, who holds 7.1% of the preferred non-voting stock in Alliance Broadcasting Corporation, has an 80% interest in the licensee of WQCK(FM), Clinton, Louisiana. In an amendment reporting this acquisition, a representation was made that Henry would divest this interest in the event of a grant to Alliance. This aspect of the amendment was not challenged by any other party and the amendment was accepted. FCC 84M-2627, released June 11, 1984. In the circumstanc-

[18] While the parties cite no precedents which appear applicable to the matters at issue, the result reached is consistent with the Commission's recent order in *High Sierra Broadcasting, Inc.*, Docket No. 81-637, FCC 84-434 released September 19, 1984. In that case, an applicant partnership was absolved of misrepresentation where the partnership was based on an oral agreement that was not particularized, reduced to writing, or signed until six months after the application was filed.

es, this interest, which would be of slight weight in any event because of Henry's small non-voting interest in Alliance, will not be charged against the applicant.

106. In view of the foregoing, the difference between Alliance on the one hand and SMJ and Urban on the other is of little decisional significance, and only a very slight preference will be given to SMJ and Urban under the diversification standard. See *Cleveland Television Corp.* 91 FCC 2d 1129 (Rev. Bd. 1982).

107. *Comparative Coverage.* Findings relevant to this comparison are set forth at paras. 7-8. They show that Urban and Alliance would serve a substantially larger area than SMJ and a greater population as well;[19] the difference is 221,508 in the case of Alliance and 204,191 for Urban. In addition, while SMJ's proposed coverage area already receives at least five other Grade B services, that of Alliance and Urban would reach some underserved areas. Alliance would provide a fourth service to 4,520 persons and a fifth service to 8,989, while Urban would bring a fourth service to 2,000 people and a fifth service to 3,253. Urban and Alliance are, therefore, entitled to a modest preference over SMJ; and since Alliance will bring a fourth or fifth service to 8,256 more people than Urban, it is entitled to a very slight preference over Urban.

108. *Integration of Ownership and Management.* Each applicant proposes to have its principals work full-time on the day-to-day operation of the station. SMJ's sole stockholder, Susan Jaramillo, would assume the position of general manager, as would Urban's general partner, Charles Walker. All seven stockholders of Alliance's general partner, Alliance Broadcasting Corporation, would work at the station full time in managerial positions: JoAnn Watkins (8.0%),[20] general manager; J.T. Doke (20%), chief engineer; Charles Harrison (20%), director of public relations; Calvin Murphy (20%), sports director; Isabel Estrello Silvas (14.5%), sales manager; Joseph D. Atkinson, Jr. (15%), EEOC officer and community relations director; and Elayne Tatar (2.5%), program director. Each of the applicants had advanced arguments against crediting its opponents' proposals but they rest largely on speculation. The presiding officer is pursuaded that each is a feasible, credible managerial plan, and all three applicants will be credited with 100% integration of ownership with management. Any preference thus turns on the qualitative aspect of the proposals, i.e. minority ownership, broadcast experience, local residence and civic participation.

109. Minority (and/or female) ownership is so strong a factor in each application that it is almost eliminated as a decisional consideration. SMJ's

[19] The population figures are: SMJ - 2,999,374; Alliance - 3,220,882; Urban - 3,203,699.

[20] The parenthesized figures reflect ownership of voting stock in the corporate general partner.

sole owner Susan Jaramillo, is a Hispanic female; and Urban's general partner, Charles Walker, is a black male. Alliance's structure is more diverse, but its ownership is also 100% minority and/or female. Specifically, Harrison, Murphy and Atkinson (55%) are black males; Doke (20%) is an American Indian; Estrello Silva (14.5%) is an Hispanic female; and Watkins and Tatar (10.5%) are white females. Thus the Commission's policy of fostering the ownership of broadcast facilities by minorities and women would be well served by a grant to any of the three applicants. For this reason, the presiding officer concludes that the applicants are almost equally enhanced by the ethnic and sexual composition of their ownership, with a slight preference given to SMJ because Ms. Jaramillo is both female and a member of a minority group.

110. SMJ and Urban have considerable broadcast experience. As described in the findings (paras. 16-18), Susan Jaramillo has been employed for more than six years in broadcast or broadcast-related positions, including approximately 18 months of operational experience as general manager of WDZL(TV), Miami, Florida. Urban's Charles Walker has had more than 10 years of experience in television program production. Findings, para. 58-59. Alliance claims no broadcast experience. SMJ and Urban are thus preferred over Alliance, and are deemed equal to each other, with Walker's longer career in broadcasting being offset by Jaramillo's direct operational experience at WDZL(TV). See *Angeles Broadcasting Network*, 56 RR 2d 149 (Rev. Bd. 1984). The advantage accorded Urban and SMJ is accompanied by the usual caveat that "this enhancement factor is of only "minor significance'." *Radio Jonesboro, Inc.*, 55 RR 2d 991, 995 (Rev. Bd. 1984).

111. With respect to local residence and civic participation, Alliance is clearly the superior applicant. Though Jaramillo and Walker proposed to move to Houston in the event of a grant, they have never been local residents and have no record of participation in civic affairs in the area. Alliance, on the other had is composed of individuals who have resided in the Houston area for many years: Harrison, 50 years; Watkins, 25 years; Doke and Atkinson, 20 years; Murphy and Tatar, 12-15 years; and Silvas 12 years. In addition to these deep roots in the area, these individuals have been active - some extremely so - in civic activities in the area. Their varied and extensive endeavors and affiliations are set forth in the findings and need not be repeated here; it suffices to say that the record is an impressive one. While credit will be given to Jaramillo and Walker for their proposals to move to the area, it is evident that Alliance is entitled to a strong preference for local residence and civic participation.

112. In sum, all three applicants have been credited with 100% full-time integration of ownership and management. As enhancement factors, SMJ has received a slight credit for female ownership; SMJ and Urban

have been preferred for broadcast experience, and Alliance has been given a strong preference for local residence and civic participation. Put another way, SMJ has a slight advantage in an area of some importance; SMJ and Urban have a clear preference for a factor of minor significance, and Alliance has a strong (or clear) preference in enhancement categories traditionally regarded as significant indicators of an applicant's ability to provide the best practical service to the public. On balance the presiding officer concludes that Alliance is entitled to a preference in the overall assessment of the qualificative factors tending to enhance an applicants integration proposal. However, the preference is a small one since the margin of difference is small and the applicants are equal in the more important matter of quantitative integration. See *Christian Broadcasting of the Midlands Inc.*, FCC 84R-78, released October 31, 1984.

113. *Specialized Programming.* Alliance has sought a preference for its proposal to broadcast only Spanish language or Spanish/English bilingual programming. Program formats are relevant under the comparative issue on a showing that "a proposed specialized format is not available in the particular market in a substantial amount." *George E. Cameron, Jr. Communications,* 71 FCC 2d 460, 465 (1979); and a preference has been awarded where a need for the proposed format has been established. *American International Development, Inc.*, 86 FCC 2d 808 (1981).

114. The Hispanic population of Houston is slightly more that 280,000, comprising 17.6% of the city's total population. In the Houston SMSA, the figures are approximately 425,000 and 14.6%. Spanish is the primary language spoken in the homes of 224,281 persons age five and over in Houston and in the homes of 332,752 such persons residing in the Houston SMSA. Findings, para. 47. While certain of these figures may not be precise (for the reason noted in the findings) they strongly suggest that there is a sizeable audience for Spanish language programming in the area.

115. There are presently seven television stations in Houston. While each of these stations carry some Spanish language (or bilingual) programming, the combined weekly total of all such broadcasts amounts to approximately 12.5 hours of programming. Thus, seven stations, each broadcasting seven days a week - 49 days of programming - carry little more than one-half a day of Spanish or bilingual programming, much of which, it should be noted, is shown at hours (5:00 a.m. - 7:00 a.m.; 12:00 p.m. - 1:00 a.m.) that are not likely to attract sizeable audiences.

116. In view of the Hispanic population in the area and the dearth of Spanish language programming, it is obvious, even when allowance is made for those Hispanics who are English-speaking as well, that a need for the format proposed by Alliance has been shown. Since this will be the

eighth television station authorized for Houston, Alliance's Spanish language format entitles the applicant to at least a moderate preference. See *American International Development, Inc., supra; United Broadcasting Company, Inc.*, 94 FCC 2d 938, 951-952 (Rev. Bd. 1983).

117. *Auxiliary Power.* Though not noted in the findings, SMJ proposes an auxiliary source of power, while Urban and Alliance do not. While Urban makes a strong argument against using this consideration as a comparative criterion in this case (Reply Findings pp. 43-47), the presiding officer is obliged under recent decisions of the Review Board to grant a very slight preference to SMJ.[21]

118. *Summation.* Family has been disqualified because it has no antenna site and has received a major demerit because of the irresponsible pattern of conduct displayed in its attemps to obtain various sites. The choice, therefore, lies between Alliance, SMJ and Urban. Though Alliance's ownership ties to other communication media are almost *de minimis*, a very slight preference has been given to SMJ and Urban because of the absence of any links whatever to other mass media. Alliance has received a slight preference over Urban for its proposed coverage and both are entitled to a modest preference over SMJ. On integration of ownership and management Alliance is also entitled to a small preference on the strength of the enhancement credit given for its local ownership and civic participation. Alliance has also been given a modest preference for its specialized programming, while SMJ has received a very slight preference for its proposed auxiliary power. Of these three well qualified applicants, Alliance thus emerges as the best qualified under the Commission's comparative criteria.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Alliance Broadcasting Co., Ltd. IS GRANTED and the applications of Houston Family Television, Ltd., SMJ Television Company and Urban Broadcasting Systems ARE DENIED.[22]

FEDERAL COMMUNICATIONS COMMISSION

JOHN H. CONLIN, *Administrative Law Judge*

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[21] See e.g. *Washington's Christian Television Outreach, Inc.* 56 RR 1539, 1560 (1984).

[22] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Application, Amendment of, Effect of Delay in Filing
Issue, Enlargement of, Denied
Ownership Common
Site Availability
Television Station, Authorization

Review Board affirmed *ID* grant to sole remaining applicant and denied exceptions of party-intervenor. Weight of evidence strongly supported *ID*'s resolution of common ownership issue in applicant's favor. Significant failure to report loss before designation of initial transmitter tower might ordinarily warrant comparative demerit, but was inapposite here. Amendments were properly accepted by ALJ. —*Ithaca TV Associates*
MM Docket No. 83-475

FCC 85R-57

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Craig Fox, P. Rydell, *et al.*, d/b/a Ithaca TV Associates Ithaca, New York	MM Docket No. 83-475 File No. BPCT-820510KZ
For Construction Permit	

Appearances

David D. Oxenford and *Martin R. Leader*, on behalf of Ithaca TV Associates; and *Barry D. Wood* and *Jerry V. Haines*, on behalf of L. Richard Stumbar.

DECISION

Adopted: July 10, 1985; Released: July 16, 1985.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL.

BOARD MEMBER BLUMENTHAL:

1. This proceeding now involves only the application of Craig Fox, P. Rydell, *et al.*, d/b/a Ithaca TV Associates (ITVA) for authority to

construct a new commercial television station to operate on Channel 52 at Ithaca, New York. By *Hearing Designation Order (HDO)*, 48 Fed. Reg. 23483, published May 25, 1983, the application (and one other voluntarily dismissed) was designated for hearing on an issue to determine whether there is any common ownership, operation or control of ITVA's proposed television station and Stations WOLF(AM), Syracuse, New York, and WQNY(FM), Ithaca, New York; and, if so, whether a grant of ITVA's application would be consistent with the public interest. The *HDO* made L. Richard Stumbar (Stumbar), who had filed informal objections, a party to the proceeding with respect to this issue. In an *Initial Decision* (*I.D.*), FCC 84D-85, released December 18, 1984, presiding Administrative Law Judge Joseph Chachkin (ALJ) resolved the issue favorably to the applicant and granted its application.

2. The proceeding is now before the Review Board on exceptions filed by Stumbar and ITVA's reply, followed by Stumbar's Petition to Reopen the Record and Enlarge Issues, filed April 9, 1985, and pleadings responsive thereto. The Board has reviewed the *I.D.* in light of these pleadings, the oral argument held March 22, 1985, and our independent examination of the underlying record. We adopt the *I.D.*'s findings of fact and conclusions of law, except as modified herein, and affirm the ALJ's ultimate conclusion that grant of ITVA's application will serve the public interest, convenience, and necessity.

3. *Common Ownership Issue.* The ALJ found that there was no common ownership, operation or control between ITVA and Station WQNY(FM), which is licensed to Kimmanger Communications, Inc. (Kimmanger), *I.D.*, paras. 5, 14. Also, he deemed irrelevant any consideration of Station WOLF(AM), because the regional concentration of control provision of Section 73.636 of the Commission's Rules, 47 CFR §73.636, which prohibited the ownership of three broadcast stations where any two were within 100 miles of the third and where there was a primary service contour overlap between any of the stations, was abrogated by the Commission in *Multiple Ownership (Regional Concentration of Control Provisions)*, 49 Fed. Reg. 19482, 55 RR 2d 1389 (1984), *recon. denied*, 58 RR 2d 119 (1985), *appeal pending sub nom. Nat'l Assn for Better Broadcasting* v. *FCC*, No. 84-1274 (D.C. Cir. filed June 29, 1984). *I.D.*, n. 6.[1] In its exceptions, Stumbar claims that, contrary to the *I.D.*'s conclusion, the record demonstrates that grant of ITVA's application would create an impermissible concentration of control of broadcast media in Ithaca and that the ALJ "erred in not adding a misrepresentation issue as

[1] In fact, Section 73.636 was replaced by a new, more limited multiple ownership rule which, unlike its predecessor, applies uniformly to all broadcast services, namely Section 73.3555 of the Rules, 47 CFR §73.3555.

to the participation of ostensible non-parties in ITVA's application." Stumbar Exceptions at 16. We disagree with Stumbar on both counts.

4. We begin by noting that, although Stumbar first raised the common ownership issue in prehearing pleadings and was made a party to the proceeding, he chose not to attend the hearing nor to offer evidence on the issue. *See* Tr. 36-37; *I.D.*, n. 8. Instead, he limited his role to filing pleadings, including the exceptions and petition now before the Board. On the other hand, ITVA filed several exhibits and was prepared to offer several witnesses for cross-examination. The ALJ fully considered the record evidence, *I.D.*, paras. 4-12, and concluded that it established the absence of common ownership, operation or control of ITVA and Station WQNY(FM). *Id.*, at paras. 13-14. Stumbar's exceptions offer largely speculation and surmise in his quest for a conclusion more to his liking. His citation of other business ventures in which ITVA principal Craig Fox and Kimmanger principal George Kimble both have ownership interests (Stumbar Exceptions at 16-19) fails to show that Kimble has any ownership interest in, or control over, ITVA. Stumbar observes that Kimble is president of the licensees of Stations WAQX-FM, Manlius, New York and WOLF(AM), Syracuse, New York and that Fox is general manager of these stations. Stumbar Exceptions at 19; *see also* ITVA Reply at 21-22; ITVA Exh. 3 at 2 (and Attachment 1 at 2).[2] However, each man denied under oath that either will have any interest, ownership, or control in the other's station at Ithaca. ITVA Exhs. 3 at 3, 6 at 3. In addition, Fox's past performance of limited contract engineering for some of Kimble's stations, without any day-to-day decision-making role at these stations, fails to advance Stumbar's basic argument. *See* ITVA Exhs. 3 at 2-3, 6 at 1-2. Moreover, the fact that Kimble owns the transmitter tower and is the lessee of the tower site upon which ITVA previously proposed to locate its transmitter and upon which ITVA principal Kenneth A. Horowitz locates the transmitter for his radio paging business does not by itself show that Kimble has any control over ITVA.

5. However, in an attempt to buttress his claim, Stumbar lifts out of context the oral testimony of Dr. Bernard Boozer, president of former competing applicant Oswego Broadcasting and Communications, Inc., who, in connection with a "failure to report" issue specified against Oswego, testified concerning a June 1982 settlement negotiation with ITVA's Craig Fox as follows:

> At that time, Mr. Fox suggested that I could merge with Ithaca TV Associates and receive 20 percent but no money . . . . I told him I was not interested in that type [of] an arrangement and would offer to reimburse their expenses . . . . He [Mr. Fox] then further stated that Mr. Kimble, Alan Gerry [another Kimmanger principal], and

[2] Apparently, neither of these stations will serve Ithaca, ITVA Exh. 3, Attachment 2, and Stumbar has not alleged to the contrary.

> other principals were interested in reimbursing me for my expenses. I told him at that time I would make a counteroffer . . . .

Tr. 153. No cross-examination questions were asked to explore whether Boozer actually recalled that Fox told him that Kimble and Gerry, in particular, were offering to reimburse him, or whether Boozer simply *assumed* that Kimble and Gerry were among the ITVA principals alluded to by Fox. In weighing Boozer's testimony, we must consider that Oswego was then a competing applicant and Boozer desired to "knock Ithaca TV Associates out of this proceeding," Tr. 88, and that, in connection with an Ilion, New York FM proceeding, Boozer was found to have made egregious misrepresentations to the Commission, *see Paradise Broadcasting and Communications System, Inc.*. 57 RR 2d 1013 (Rev. Bd. 1985).

6. In contrast to the above testimony of Dr. Boozer, ITVA offered the written testimony of principals Craig Fox and Kenneth A. Horowitz, Kimmanger principal George Kimble, and former ITVA counsel James L. Oyster that there is no common ownership, operation or control between ITVA's proposed television station and Kimmanger's Station WQNY(FM). ITVA Exhs. 3, 5-7. These principals were available for cross-examination, but Stumbar declined to appear and avail himself of this opportunity. In sum, the weight of the evidence strongly supports the ALJ's resolution of the common ownership issue in ITVA's favor. *Cf. Cleveland Television Corporation*, 91 FCC 2d 1129, 1131-1133 (Rev. Bd. 1982), *review denied*, FCC 83-235, released May 18, 1983, *aff'd*, 732 F.2d 962 (D.C. Cir. 1984). Perforce, we deny Stumbar's exception that the ALJ erred when he refused to add an issue to determine whether ITVA's assertions that Kimble and Gerry had no involvement with its application amounted to misrepresentation, *Memorandum Opinion and Order*, FCC 84M-3462, released August 9, 1984, at para. 4. *See* Section 1.229(d) of the Rules, 47 CFR §1.229(d) (motion to enlarge issues must contain specific and sufficient allegations of fact).

7. *Site Availability Issue.* The ALJ twice rebuffed requests to add a site availability issue and a related misrepresentation issue against ITVA and twice permitted ITVA to amend its site. *Memorandum Opinion and Order*, FCC 84M-465, released January 27, 1984 (denying Oswego's Petition to Enlarge Issues, filed November 4, 1983, and granting ITVA's Petition for Leave to Amend, filed December 7, 1983); *Memorandum Opinion and Order*, FCC 84M-3462, released August 9, 1984 (denying Stumbar's Petition to Enlarge Issues, filed February 29, 1984, and granting ITVA's Petition for Leave to Amend, filed April 20, 1984). In its exceptions, Stumbar claims the ALJ erred in refusing to add the requested issues and in granting ITVA's petitions for leave to amend. For reasons that follow, we essentially affirm the ALJ's actions.

8. A brief chronological review of ITVA's transmitter site problems will be illuminating. In its application, filed May 10, 1982, ITVA proposed to locate its transmitter upon a new tower proposed to be built by Kimmanger, which also desired to move its Station WQNY(FM) (then called WEIV-FM) transmitter to that tower. Stumbar filed an informal objection on June 28, 1982 stating that the New York State Office of Parks, Recreation and Historic Preservation (hereinafter "Park Authority"), which owned the land upon which Kimmanger had both its existing and proposed transmitter towers, would be unlikely to approve construction of the new tower because of environmental concerns. The *HDO, supra*, denied Stumbar's objection. Although the Park Authority apparently denied Kimmanger authority to construct a *new* tower in July 1982, *see* Oswego Petition to Enlarge Issues, filed November 4, 1983, Attachment No. 3 (October 26, 1983 letter of Andrew R. Mazzella, Regional Manager, Park Authority), at 1,[3] ITVA claims that it was not expressly informed of this until "several months" before June 15, 1983. *Id.*, at 2; *see also* Stumbar Petition to Reopen the Record and Enlarge Issues, filed April 9, 1985, Exh. 1 (Craig Fox letter to Andrew Mazzella, dated June 15, 1983). The record contains no evidence that Kimble advised his prospective lessee, Fox (or ITVA), that the Park Authority was negative on the tower. Indeed, the tower matter was becoming increasingly moot because ITVA became actively involved in settlement negotiations with Oswego, culminating in an agreement filed July 20, 1983, whereby the ITVA application would be dismissed with prejudice. *Memorandum Opinion and Order*, FCC 83M-2889, released August 25, 1983 (approving dismissal of ITVA application).

9. However, the ALJ subsequently granted the Mass Media Bureau's petition for reconsideration filed September 2, 1983, rescinded the *MO&O* which approved the dismissal agreement, and added a reporting issue against Oswego. *Memorandum Opinion and Order*, FCC 83M-3304, released September 21, 1983. Then, at an October 7, 1983 prehearing conference, the Bureau informed the ALJ that it had received a June 6, 1983 letter from the Park Authority addressed to the Commission raising "questions regarding the availability of [ITVA's] antenna site." Tr. 30. ITVA's counsel responded:

> I have never seen this letter but I was advised by my client that they had run into problems with the Park [Authority] regarding their transmitter site and that they had located the new site and were preparing an amendment to the transmitter site. However, I instructed them that there was no point in doing that because we had

[3] Mr. Mazzella stated (*id.*):

> On July 7, 1982, I wrote Mr. Kimble that his request had been denied. Subsequent to that (July 22, 1982) Mr. Kimble requested that we put off any consideration of his request for a tower until a more thorough study was completed.

> settled the case and [were] dismissing the application. However, in light of the change in circumstances [*i.e.*, rescission of the settlement agreement], we would now go ahead with the amendment and file . . . a motion for leave to amend.

Tr. 31. ITVA then filed a petition for leave to amend on December 7, 1983, and indicated it would merely sidemount its antenna on an existing tower "directly adjacent to WQNY-FM's . . . currently active tower," with reduced height and increased power from its original proposal, and with no change in coordinates, Grade B contour, antenna pattern, orientation, or beam tilt. ITVA Petition for Leave to Amend, filed December 7, 1983, Amendment, Engineering Discussion. The ALJ granted the petition. *MO&O*, FCC 84M-465, *supra*.

10. However, the Park Authority then raised a yet further objection, and stated that it "will oppose any additional construction or modification of existing towers in the proposed transmitter site." Stumbar Petition to Enlarge Issues, filed February 29, 1984, Exh. 1 (December 13, 1983 letter of Andrew Mazzella). After a period (February 28 through April 10, 1984) during which a New York State Supreme Court Justice enjoined ITVA from further prosecuting its FCC application so that he could consider Oswego's complaint seeking specific performance of the rescinded settlement agreement, *see* para. 9, *supra*, ITVA filed a petition for leave to amend on April 20, 1984 and specified a new transmitter site beyond the domain of the Park Authority. The ALJ granted this petition to amend. *MO&O*, FCC 84M-3462, *supra*, at paras. 9-10.[4] Subsequently, the ALJ approved a new settlement agreement between ITVA and Oswego, and dismissed Oswego's application. *Memorandum Opinion and Order*, FCC 84M-4267, released October 3, 1984. The *I.D.* and this appeal followed.

11. What becomes apparent from the preceding chronology is that ITVA's failure to report within 30 days of its discovery (see paras. 8-9, *supra*) — even before the 1983 designation of its application for hearing — that the Park Authority would not approve construction of the new, taller tower upon which it initially proposed to locate its transmitting antenna was a very serious reporting failure. *See* Sections 1.65 and 73.3522(a)(2) of the Rules, 47 CFR §§1.65 and 73.3522(a)(2). However, because ITVA apparently believed it could have relocated to an adjacent, existing tower, no strong motive for the reporting failure seems present. *Cf. Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983) (Comm'n). Moreover, its reporting dereliction is mitigated by: (1) its settlement negotiations with Oswego, which ITVA accurately believed would lead to the dismissal of its own application; (2) counsel's advising the ALJ at an

[4] Additional delay in the proceedings was caused by Oswego's request that the ALJ disqualify himself. *See Order*, FCC 84M-2181, released May 8, 1984 (ALJ) (suspending hearing pending ruling by Commission); *Memorandum Opinion and Order*, FCC 84-259, released June 18, 1984 (Comm'n) (no basis for disqualification of ALJ).

October 7, 1983 prehearing conference, held after ITVA's application was reinstated, that ITVA had a transmitter site problem; and (3) ITVA's filing of a December 7, 1983 amendment responding to the Park Authority's expressed concern over *new* tower construction (by proposing to merely mount its antenna on an existing tower). When it later became apparent that the Park Authority would oppose even the amended proposal,[5] ITVA promptly proceeded — within 11 days after a local court injunction against the further prosecution of its application was lifted — to amend to a new site over which it, without dispute here, has reasonable assurance. Hence, unlike the situation in *Shoblom Broadcasting, Inc.*, 95 FCC 2d 444 (Rev. Bd. 1983), *aff'd mem. sub nom. Royce International Broadcasting C.* v *FCC*, No. 84-1168 (D.C. Cir. April 30, 1984) (application denied and denial of petition for leave to amend affirmed because amendment was not diligently filed, was disruptive of hearing, and was prejudicial to competing applicants), ITVA's amendments have not required addition or modification of issues or an increase in the amount or direction of proof on existing issues, and have not disrupted the proceeding nor prejudiced any competing applicants. In fact, there is no longer any competing applicant here. In addition, ITVA's prompt responses to challenges to its site have been to amend to specify new sites whose availability seemed reasonable. Thus the facts here also stand in contrast to those in *Valley FM Radio*, 57 RR 2d 420 (Rev. Bd. 1984), where we affirmed the disqualification of an applicant for deliberate, repeated reporting violations and for lack of candor in failing to forthrightly disclose that the landowner of the transmitter site upon which it continued to rely had denied it permission to use the site, as well as in contrast with the facts in *Houston Family Television, Ltd.*, FCC 85R-56, released July 10, 1985, at paras. 3-7, where we affirmed the denial of a belated, fourth transmitter site amendment for lack of good cause, the denial of the application for lack of an antenna site, and the assessment of a substantial comparative demerit for gross carelessness, ineptitude, and misrepresentations concerning the applicant's antenna site. In sum, while ITVA might otherwise warrant a comparative demerit for its significant reporting failure, *see, e.g., Broadcast Associates of Colorado*, FCC 85R-25, released March 19, 1985 (Rev. Bd.), at paras. 9-16, any such demerit would be academic here, since there is no competing applicant; its basic qualifications for candor and reporting are not destroyed. *Compare George E. Cameron, Jr. Communications*, 91 FCC 2d 870, 872-884 (Rev. Bd. 1982) (applicant disqualified for "numerous and repeated reporting violations"). Moreover, the circumstances of this case

[5] Nothing in the Park Authority letters written before the December 7, 1983 amendment date suggested in the slightest that it would oppose additional antennae on an *existing* Kimmanger tower.

cited above —*i.e.*, ITVA's amendments have caused neither delay nor prejudice to other applicants — militate strongly in favor of the applicant. We therefore affirm the ALJ's acceptance of ITVA's amendments. *See Son Broadcasting, Inc.*, 92 FCC 2d 450 (Rev. Bd. 1982).[6]

12. Finally, we deny Stumbar's Petition to Reopen the Record and Enlarge Issues, filed April 9, 1985. Stumbar seeks to include in the record a June 15, 1983 letter from ITVA's Craig Fox to the Park Authority's Andrew Mazzella in which Fox stated "[it] had come to my attention several months ago that your association will not permit any new or taller towers . . . ." The petition is untimely because both the existence of and the contents of the letter were revealed at hearing in connection with Oswego's Petition to Enlarge Issues, filed November 4, 1983, *see* para. 8, *supra*, and the reporting, misrepresentation/lack of candor, site availability, and "good cause" issues it now seeks are merely repetitious of its exceptions and as such have been fully addressed hereinabove. *See* Section 1.229(b)-(d) of the Rules, 47 CFR §1.229(b)-(d).

13. All decisionally significant exceptions having been addressed, and denied, we therefore affirm the ALJ's conclusion that ITVA is fully qualified to be a Commission licensee.

14. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Amend filed March 27, 1985 by Craig Fox, P. Rydell, *et al.*, d/b/a Ithaca TV Associates IS GRANTED, and the amendment IS ACCEPTED; and

15. IT IS FURTHER ORDERED, That the Petition to Reopen the Record and Enlarge Issues filed April 9, 1985 by L. Richard Stumbar IS DENIED; and

16. IT IS FURTHER ORDERED, That the application of Craig Fox, P. Rydell, *et. al.*, d/b/a Ithaca TV Associates (File No. BPCT-820510KZ) for authority to establish a new television station at Ithaca, New York IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

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[6] Also, we do not agree with Stumbar that because ITVA relied on the representations of the site lessee, Kimmanger, rather than the site owner, Park Authority, its amendments were "foreseeable" within the meaning of 47 CFR §73.3522(b)(i). Its reliances were based on the past course of dealing of its principal Kenneth Horowitz with Kimmanger's George Kimble, whereby Horowitz was able to completely satisfy his paging business' antenna site needs by dealing entirely with Kimble. Under these circumstances, ITVA could not have reasonably anticipated problems with the Park Authority.

FCC 84D-85

BEFORE THE

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WASHINGTON, D.C. 20554

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Craig Fox, P. Rydell, et al., d/b/a Ithaca TV Associates Ithaca, New York	MM Docket No. 83-475 File No. BPCT-820510KZ
For Construction Permit	

Appearances

Martin R. Leader and *David D. Oxenford*, on behalf of Ithaca TV Associates; *L. Richard Stumbar, Barry D. Wood* and *Jerry V. Haines*, on behalf of L. Richard Stumbar, party respondent; and *Stephen Yelverton*, on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
JOSEPH CHACHKIN

Issued: December 14, 1984; Released: December 18, 1984

Preliminary Statement

1. *By Hearing Designation Order*, MM4096 (released May 12, 1983), the Chief of the Mass Media Bureau, acting pursuant to delegated authority, designated the applications of Oswego Broadcasting and Commissions, Inc. (Oswego) and Ithaca TV Associates (ITVA) for comparative hearing. The Oswego application has since been dismissed with prejudice following a settlement between the parties. See, *Order*, FCC 84M-4267 (released October 3, 1984).

2. In the *Hearing Designation Order* a single qualifying issue was specified against ITVA. The issue was to explore whether ITVA had complied with Section 73.636 of the Commission's rules. Questions regarding such compliance were raised because of purported "interlocking interests among the principals of Stations WOLF(AM), Syracuse, New York, WQNY(FM) (previously WEIV(FM)), Ithaca New York and this application." The Commission believed that these matters should be probed at hearing to determine if they violated either the one-to-a market

or regional concentration of control provisions of the multiple ownership rules. The issue was specified as follows:

> To determine with respect to Ithaca TV Associates whether there is common ownership, operation or control of WOLF(AM), Syracuse, New York, WQNY(FM), Ithaca, New York, and the proposed television station; and if there is, whether a grant of the proposed facility would be consistent with the public interest.

3. A direct written case addressing the issue was exchanged by ITVA on December 8, 1983. A hearing session was held on December 19, 1983. No principals of ITVA, nor any of those persons sponsoring testimony on behalf of ITVA, were called for cross examination and no rebuttal evidence was offered by the other parties. The record in this proceeding was closed as of October 3, 1984.[1] Proposed findings of fact and conclusions were filed October 23, 1984 by ITVA and on November 5, 1984 by L. Richard Stumbar (Stumbar), who was made a party solely on the concentration of control issue. Replies were filed November 15, 1984 by ITVA, Stumbar and the Mass Media Bureau.

Findings Of Fact

4. ITVA is a general partnership with three partners: Craig Fox (38% interest), Peter Rydell (37% interest) and Kenneth Horowitz (25% interest). ITVA Ex. 2, p. 1; Ex. 3, p. 1; Ex. 4, p. 1. The ITVA partnership agreement provides that all decisions of the partnership must be unanimous (ITVA Ex. 5, p. 1).

5. WQNY(FM), licensed to Ithaca, is owned by Kimmanger Communications, Inc. (ITVA Ex. 6, p. 2). The principals of that licensee are George Kimble[2] Alan Gerry and Russell Kimble (ITVA Ex. 3, p. 1). None of these individuals have or will have any relationship with ITVA. None will be providing any services, financing or advice to ITVA (ITVA Ex. 3, p. 2). Kimmanger had agreed to make a transmitter site location available to ITVA. The licensee will charge ITVA rent, just as it would any other tower user (ITVA Ex. 6, p. 2).[3] Kimmanger also leases its tower to other communications users (ITVA Ex. 5, p. 1).

6. Craig Fox owns several broadcast interests in common with the principals of Kimmanger.[4] However, not all of Fox's media interests are held in common with principals of Kimmanger. Mr. Fox is a 33 1/3% partner in Mohawk Valley Broadcasting Associates, the permittee of

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[1] The record in this proceeding had been kept open pending further hearings on the comparative issue and the qualification issues added against Oswego. The approval of the settlement agreement mooted the need for trial of these issues.

[2] President and 25% shareholder (ITVA Ex. 6, pp. 1-2).

[3] ITVA no longer intends to use the WQNY site as its transmitter location. *See*, Petition for Leave to Amend filed April 20, 1984, granted by *Order*, FCC 84M-3462 (released August 9, 1984).

[4] Peter Rydell also has very minimal stock holdings in two television construction permits in which Fox and Kimmanger principals have interests (ITVA Ex. 2).

WTUV-TV, Utica, New York. None of the Kimmanger principals have any relationship to that permittee (ITVA Ex. 3, p. 2). The Kimbles have radio stations in Canadaigua, New York (WCGR and WFLC-FM) in which Craig Fox has no interest whatsoever (ITVA Ex. 3, p. 2; Ex. 6, p. 1). Similarly, George Kimble formerly was a part owner of WDNY, Danville, New York, in which Fox had no interest. Mr. Fox also has no interest in a racquet club in which Mr. Kimble is an owner (ITVA Ex. 6, p. 1).

7. Fox has had no participation in the decision-making at any of Kimble's independently owned businesses, nor has he received any benefits from those business operations (ITVA Ex. 3, p. 3; Ex. 6, p. 1-2).[5] This includes the operation of WQNY in Ithaca (ITVA Ex. 6, p.2). Kimble is not at all involved in Fox's Utica, New York television permit. Nor has he been involved in the Ithaca application, with the sole exception of providing the antenna space already mentioned. *Id.* At one time, ITVA and Kimmanger were represented by the same communications counsel. The legal bills for ITVA were submitted to Fox for payment by the partnership. Those for Kimmanger communications were sent to Mr. Kimble. The counsel who represented both groups never looked to Fox to be responsible for the debts of Kimmanger, nor to Kimble as responsible for ITVA debts. Counsel saw no evidence that ITVA and Kimmanger were in any way related. He rendered the opinion that there is no common ownership, operation or control of WQNY(FM) and Ithaca TV Associates (ITVA Ex. 7, p. 4).

8. ITVA principal Kenneth Horowitz has had no prior business relationships with the Kimmanger owners, with the exception of the leasing of antenna space on the WQNY tower for his paging antennas (ITVA Ex. 5, p. 1). Mr. Horowitz had previously leased tower space from the Christian Broadcasting Network, the former licensee of WQNY. Mr. Horowitz was not initially involved with Fox and Rydell in the pursuit of the Ithaca permit, planning instead to pursue his own application. In preparing that application he learned of the Fox and Rydell plans and the three decided to merge their efforts (ITVA Ex. 5, p. 1). Mr. Horowitz is an experienced businessman involved in cellular communications applications and owning and operating paging, radio telephone and answering service companies in New York State, including one serving Ithaca. *Id.* at p. 2.

9. As all decisions of ITVA must be by unanimous vote among the partners, Mr. Horowitz can block any action which the group proposes to take. Mr. Kimble could not be given any control of or interest in the Ithaca television station without the approval of Mr. Horowitz. No such approval

[5] Mr. Fox has done some contract engineering for stations owned by Kimble. However, these have been in very limited circumstances (ITVA Ex. 7, p. 1-2). Mr. Fox has also provided contract engineering services to a number of other stations wholly unrelated to Kimble (ITVA Ex. 3, Att. 1, p. 2).

has ever been sought. Given Mr. Horowitz's understanding of the multiple ownership rules, he would not give his approval to the acquisition of any interest by Kimmanger principals if it was sought (ITVA Ex. 5, p. 1).

10. All principals of ITVA are experienced businessmen and would have no need to rely on Kimble or his partners for advice or direction. Craig Fox is an experienced broadcaster and consulting engineer (ITVA Ex. 3, p. 2; Ex. 3, Att. 1). Peter Rydell is also an experienced broadcaster (ITVA Ex. 4, pp. 1-3). Kenneth Horowitz's business experience is set out above.

11. Ithaca is a competitive television market. Competition could not be lessened by either WQNY or the ITVA television station in order to aid each other. If such a reduction in competition was undertaken, it would no doubt benefit the other marketplace competitors as much or more than it would either of these stations (ITVA Ex. 3, p. 3). Eight AM and five FM stations provide service to Ithaca. Seven television stations place a Grade B signal over the city (ITVA Ex. 3, Att. 2).

12. George Kimble does not provide day-to-day management at WQNY. Instead, that is provided by a hired general manager. The general manager sets the policy as to which salesman visit which advertisers. Similarly, Craig Fox will not work full-time at the Ithaca station, but will instead leave management to Peter Rydell. Thus, neither Fox nor Kimble would have a direct supervisory position which would influence the stations to refrain from full competition (ITVA Ex. 6, p. 3).

Conclusions

13. The only question to be determined is whether there is any common ownership, operation, or control of Station WQNY(FM), Ithaca, New York,[6] and the proposed ITVA television station in Ithaca, New York which would violate the Commission's multiple ownership rules.[7] The evidence presented in this case requires the conclusions that a grant of ITVA's application would not violate the multiple ownership rules.

14. The findings establish there is no common ownership, operation or control of ITVA and WQNY. The principals of the licensee of WQNY have neither a financial nor an equitable interest in ITVA, nor are there plans

[6] The issue framed included consideration of Station WOLF(AM), Syracuse, New York. *In Multiple Ownership (Regional Concentration of Control Provisions)*, 96 FCC 2d 256 (1984), the Commission deleted the regional concentration of control provisions of Section 73.636 of the Rules, which prohibited ownership of three broadcast stations where any two are within 100 miles of the other and where there is a primary service contour overlap between any of the stations. Therefore, consideration of WOLF(AM), Syracuse, New York is no longer relevant.

[7] Section 73.636 of the rules, the Section specified in designating the issue of this proceeding, has been deleted. A uniform rule for all broadcast services, Section 73.3555 has taken its place.

for their acquisition of one. They have not given advice or assistance to ITVA other than to allow ITVA to lease space for an antenna on the WQNY tower, under conditions similar to those offered to other tower users. In this connection, as noted, supra, ITVA no longer intends to use the WQNY site as its transmitter location. Craig Fox, one of ITVA's principals, owns several broadcast interests in common with the principals of WQNY. However, there is no evidence that these common interests will in any way influence ITVA decisions. Significantly Fox and the WQNY principals have other interests which are independently owned and independently run. Further, another ITVA principal, Kenneth Horowitz, has had no prior business relationship with the owners of WQNY with the exception of leasing tower space for a paging business. Because all decisions by ITVA must have unanimous approval, Horowitz, who is not associated with WQNY's principals, could and has pledged to veto any attempt by such principals to become involved in ITVA matters. Thus, Horowitz presents a buffer against any influence or control by WQNY's principals. It is also clear that ITVA's principals are experienced businessmen who have no need to rely on others for advice. Moreover, Ithaca is a very competitive market which would make collusion of no benefit. It is therefore concluded that a grant of ITVA's proposed facility is consistent with the public interest.[8,9]

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Ithaca TV Associates IS GRANTED.[10,11]

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[8] Stumbar contends in his filings that there will be common control of WQNY and the proposed television station and that ITVA misrepresented itself by representing otherwise. As pointed out by the Mass Media Bureau, which supports a grant of ITVA's application, these contentions rest on speculation and surmise. No principals of ITVA nor any of those persons sponsoring testimony on behalf of ITVA were called for cross examination and no evidence rebutting ITVA's direct case was presented. Indeed, Stumbar failed to appear at the hearing even though the Commission made him a party respondent with respect to this issue. No evidence has been presented undermining the findings as to the independence of the two entities. Accordingly, Stumbar's contentions are rejected.

[9] It is not necessary to reach ITVA's contention that it has satisfied the exception under Note 4 to Section 73.3555 of the Rules justifying FM/UHF cross-ownership.

[10] ITVA principal Craig Fox is also a principal of Jamestown TV Associates. A misrepresentation issue was specified against Jamestown. By *Order*, FCC 84M-4267, released October 3, 1984, the Presiding Judge stated that any grant of ITVA's application would be made without prejudice to whether action was taken in the Jamestown proceeding. The misrepresentation issue has been resolved in favor of Jamestown (*Memorandum Opinion and Order*, FCC 84M-4484 released October 19, 1984) and that issue is no longer of any significance to this proceeding.

[11] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH CHACHKIN, *Administrative Law Judge*

decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Reinstatement
Remand From Court of Appeals

Where application in comparative renewal proceeding was dismissed by ALJ pursuant to applicant's request that was subsequently timely withdrawn, Review Board reinstates application. Board then referred applications in proceeding to processing staff for appropriate disposition in view of court remand concerning the licensee's prior renewals. —*KQED, Inc.*
MM Docket No. 84-567

FCC 85R-34

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
KQED, Inc. San Francisco, California	MM Docket No. 84-567 File No. BRET-830801LJ
For renewal of license of noncommercial educational station KQEC(TV), Channel 32, San Francisco, California	
Minority Television Project San Francisco, California	MM Docket No. 84-568 File No. BPET-831101KI
For a construction permit for a new noncommercial educational television station on Channel 32, San Francisco, California	

MEMORANDUM OPINION AND ORDER

Adopted: April 23, 1985; Released: April 26, 1985.

BY THE REVIEW BOARD:

1. The Review Board has under consideration an appeal filed February 21, 1985, by Minority Television Project (MTP) from an Order released January 22, 1985 (FCC 85M-319) by presiding Administrative Law Judge (ALJ) James F. Tierney dismissing its application and terminating the above-captioned proceeding. The ALJ's Order was predicated on a motion filed by MTP requesting dismissal of its application, and on a supporting motion filed by the competing applicant, KQED, Inc. (KQED), which is seeking grant of its 1983 license renewal application for KQEC(TV) (Channel 32), San Francisco, California. Rather than grant KQED's application, the ALJ's Order remanded it to the Commission's processing staff (at the licensee's own suggestion) for appropriate action in light of a still-pending petition to deny the 1983 application and in the wake of the opinion in *California Public Broadcasting Forum* v. *FCC*, 752 F.2d 670 (D.C. Cir. 1985), decided a few days earlier, *i.e.*, January 11, 1985, reversing and remanding for hearing the 1977 and 1980 license renewal grants for the stations licensed to KQED (including KQEC(TV)). For the reasons set forth below, we will reinstate MTP's application and refer it as well as KQED's application to the Mass Media Bureau for further disposition. In view of our unusual action, some background concerning this unique proceeding is in order.

2. KQED is the licensee of KQED(TV) (Channel 9), KQEC(TV) (Channel 32), and KQED(FM), San Francisco, California. In 1980, and again in 1982, the Commission denied petitions filed by a coalition of various public interest groups (here collectively referred to as California Public Broadcasting Forum, the lead petitioner), which had urged the nonrenewal of KQED's licenses for the 1977 and 1980 license terms; the license renewals were granted without hearing. *See KQED, Inc.*, 77 FC 2d 973, 48 RR 2d 22 (1980); *KQED, Inc.*, 88 FCC 2d 1159, 50 RR 2d 1349 (1982). California Public Broadcasting Forum appealed the adverse decisions to the U.S. Court of Appeals for the D.C. Circuit on March 4, 1982, and October 20, 1983, respectively, where the appeals were consolidated by order of the Court. On August 1, 1983, during the pendency of California Public Broadcasting Forum's appeal to the Court, KQED timely filed with the Commission its KQEC(TV) renewal application for the 1983 license term. MTP, the appellant in this proceeding, filed a competing application for a construction permit on November 1, 1983, seeking to supplant the KQEC(TV) facility, and the mutually exclusive applications for Channel 32 were then designated for a comparative hearing on an availability of funds issue against MTP and on a noncommercial comparative issue. *See* Hearing Designation Order, Mimeo No. 4615, released June 8, 1984. California Public Broadcasting Forum also filed a petition to deny the 1983 license renewal application of KQED

(see paragraph 1, *supra*) but that petition was not acted upon in the Hearing Designation Order.

3. Prior to hearing, the parties sought, and received, a continuance of procedural dates to accommodate settlement discussions. *See KQED, Inc.*, FCC 84M-3468, released August 9, 1984. Thereafter, on January 4, 1985, MTP filed a motion captioned "Withdrawal," representing that it wished to withdraw its application for no consideration. In a motion filed January 14, 1985, KQED supported the dismissal of MTP's application, and further advised the ALJ that the Court of Appeals had issued a decision three days earlier, reversing the Commission's grants of its 1977 and 1980 license renewal applications and remanding the cases for hearing to explore whether the licensee had lied in its stated reasons for deactivating KQEC(TV) in late 1979 and early 1980. Upon receiving KQED's January 14 motion, MTP promptly filed a motion on January 18, 1985, requesting that its "Withdrawal" be rescinded based on the changed circumstances. Unaware that a rescission motion had been filed on January 18, by MTP, the ALJ, on the same day, issued his Order granting MTP's withdrawal request and terminating the proceeding. FCC 85M-319, *supra.* It is from this Order that MTP appeals. KQED filed a further pleading before the ALJ on January 24, 1985, requesting the dismissal of MTP's rescission motion, and by Order, FCC 85M-761, released February 19, 1985, the ALJ granted KQED's request, observing that MTP's remedy, if any, lay elsewhere.

4. MTP initially claims in its appeal that it rescinded its withdrawal motion before the ALJ acted on it, and that the ALJ, therefore, lacked authority to dismiss its application. Additionally, MTP does not challenge the ALJ's remand of the KQED application to the processing authorities but asserts that the instant proceeding must be deferred pending resolution and final action on KQED's 1977 and 1980 renewal applications. KQED opposes the appeal, but contends that should MTP be reinstated as a party, there is no basis to defer the proceeding because the questions pertaining to its 1977 and 1980 renewals have no relation to the comparative evaluation of KQED and MTP.[1] The Mass Media Bureau supports reinstatement of MTP's application but disagrees that MTP's application should be placed in deferred status pending resolution of the KQED 1977 and 1980 license applications.

5. We will reinstate MTP's application. Initially, we note that MTP's rescission motion was timely presented to the ALJ since it was filed on the same date the ALJ issued his Order terminating the proceeding, and the

[1] In its opposition, KQED requests oral argument, which MTP opposes. Because the Board does not believe that oral argument would materially assist it in the resolution of this appeal, KQED's request is denied. *See Federal Broadcasting System, Inc.*, 62 FCC 2d 861, 862 n. 3, 39 RR 2d 1041, 1049 n. 3 (Rev. Bd. 1977).

motion, therefore, should have been taken into account by the ALJ in a subsequent amendatory order. *See Denair Broadcasting Co., Inc.*, 49 RR 2d 1249 (Rev. Bd. 1981). In *Denair*, we held that a presiding officer erred in dismissing as moot a supplemental motion filed on the same date as his order terminating the proceeding. We pointed out that since the precise time of issuance is not stamped on an ALJ's order nor is the exact time of filing stamped on a party's pleading, it follows that the ALJ must retain "authority to act on all pleadings filed through the close of business on the 'issue' date" if the Commission is to avoid "the impossible task of attempting to determine objectively whether a pleading has been filed in the Secretary's office before or after the [ALJ] has issued his order." 49 RR 2d at 1251. Furthermore, contrary to KQED's claim that the ALJ may have considered other factors in reaching his ruling, the terms of his Order make clear that the dismissal of MTP's application was based solely upon MTP's request for withdrawal of its application. Although the ALJ had plenary authority to dismiss the application on other grounds if he found cause, *see e.g. Sco-Kim, Inc*, 90 FCC 2d 960, 51 RR 2d 1427 (Rev. Bd. 1982), a ruling based on such additional grounds would have required an articulated rationale, which was lacking here.

6. More importantly, as pointed out by the Bureau in its comments, MTP's action in rescinding its withdrawal was not unreasonable, dilatory, or abusive of the Commission's processes, but merely reflected a realization that its chances of prevailing in this proceeding had dramatically improved with the Court's remand. Since MTP had not entered into any agreement with KQED or received any consideration for its withdrawal, KQED can hardly claim prejudice because of MTP's change of heart, and the absence of an agreement also distinguishes this case from *Bison City Television 49 Limited Partnerships*, 51 RR 2d 307 (1982), cited by the ALJ in his Order dismissing MTP's rescission motion. In *Bison City*, the Commission dismissed a petition for reconsideration and clarification filed by two former applicants (whose applications had been dismissed pursuant to a settlement agreement) on the grounds that petitioners (1) lacked standing since their applications had been dismissed, and (2) were grossly dilatory in seeking Commission relief. Unlike the circumstances at bar where no settlement is present, the Commission there noted that it had "no authority to compel parties to 'abrogate' settlement agreements which are by nature contractual arrangements," 51 RR 2d at 310. And, here, of course, MTP was not dilatory. Finally, KQED has not cited any authority or policy for its contention that MTP's rescission motion had to satisfy the same standards of formality as its withdrawal motion in order to be valid, and its objection is rejected.

7. Thus, while we find it necessary to reinstate MTP's application in this proceeding, we believe it would serve no useful purpose now to return

the two mutually exclusive applications to hearing status since the Court remand potentially moots the 1983 renewal of KQED's license for Channel 32. Therefore, to avoid a procedural quagmire and to allow ample Commission flexibility in selecting the mode of procedure to address the Court's remand,[2] we will refer the applications in this proceeding to the Mass Media Bureau for appropriate disposition.

8. ACCORDINGLY, IT IS ORDERED, That the appeal filed by Minority Television Project on February 21, 1985 IS GRANTED to the extent indicated herein; and

9. IT IS FURTHER ORDERED, That the petition for leave to amend filed by KQED, Inc. on March 25, 1985, IS GRANTED; and the amendment IS ACCEPTED; and

10. IT IS FURTHER ORDERED, That the applications of KQED, Inc. for the 1983 license renewal of KQEC(TV), San Francisco (File No. BRET-830801LJ) and Minority Television Project for a construction permit (File No. BPET-831101KI) ARE REFERRED to the Chief, Mass Media Bureau for appropriate disposition.

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JEROLD L. JACOBS, *Member, Review Board*

[2] By Order, Mimeo No. 3799, released April 10, 1985, the parties to KQED's 1977 and 1980 renewal applications were afforded an opportunity to file comments concerning what further action would be appropriate pursuant to the Court's remand.

Application, Amendment of, Substantial Changes
Application, Certification of
Character Qualifications
Financial Qualifications, Availability of Funds

Review Board remands case to ALJ for Supplemental Initial Decision where a principal upon whom the applicant is relying in important part to establish its financial qualifications certified to the applicant's financial health at the very time her federal income taxes remained unpaid for two-year period. Issues relating to character, false certification, Section 1.65 and financial qualifications were added. —*Las Americas Communications, Inc.*
MM Docket No. 84-115

FCC 85R-54

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Las Americas Communications, Inc. Newark, New Jersey	MM Docket No. 84-115 File No. BPH-821105AR
Frances Lawrence Antonin and Mary Garcia d/b/a Antonin and Garcia Jersey City, New Jersey	MM Docket No. 84-123 File No. BPH-821108AQ
Caprice Broadcasting Group, Inc. Newark, New Jersey	MM Docket No. 84-125 File No. BPH-821108AS
Comserv Broadcast Group, Inc. Newark, New Jersey	MM Docket No. 84-128 File No. BPH-821108AV

Multicultural Broadcasting, Inc. Newark, New Jersey	MM Docket No. 84-131 File No. BPH-821108BE
Glenn Scotland, d/b/a Coastal Communications Company Newark, New Jersey	MM Docket No. 84-134 File No. BPH-821108BH
Omnilingual Broadcasting, Inc. Newark, New Jersey	MM Docket No. 84-137 File No. BPH-821108BK
For Construction Permit For a new FM Station	

MEMORANDUM OPINION AND ORDER

Adopted: June 27, 1985; Released: June 28, 1985.

BY THE REVIEW BOARD: BOARD MEMBER BLUMENTHAL ISSUES A STATEMENT.

1. Seven applicants remain in this contest for authority to replace the deleted facilities of broadcast Station WHBI(FM) on Channel 290, Newark, New Jersey.[1] Six of those applicants specified Newark as their proposed community of license while the seventh, Antonin & Garcia, specified Jersey City. In an Initial Decision (I.D.), FCC 84D-83, released December 18, 1984, presiding Administrative Law Judge Walter C. Miller (ALJ) granted Antonin & Garcia's application, and denied the other applications, after concluding that a station serving the radio needs of Jersey City would best satisfy the "fair, efficient, and equitable distribution of radio service" mandate of Section 307(b) of the Communications Act, 47 U.S.C. 307(b). Moreover, while not specifically setting forth conclusions under the contingent standard comparative issue, the ALJ intimated that Antonin & Garcia might win as well on that issue.

2. The proceeding is now before the Review Board on exceptions filed by the losing applicants and reply briefs filed by all of the parties. Oral argument was held May 17, 1985. We have reviewed the I.D. in light of these presentations and our examination of the record and conclude that Antonin & Garcia's application cannot be granted without further

[1] Twenty-seven applicants originally applied for this frequency. See Hearing Designation Order, 49 Fed. Reg. 6994, published February 24, 1984.

evidentiary hearing on issues stemming from the failure of its 50% principal, Mary Garcia, to pay her personal federal income taxes for two years while simultaneously prosecuting her application. Hence, because the I.D. holds that Antonin & Garcia would otherwise prevail on the Section 307(b) issue and, perhaps, the contingent standard comparative issue — judgments we are not inclined to disturb at this juncture based on our preliminary examination of the record — we will remand the case for further hearing.[2]

3. It is well established that violations of federal law by an applicant or its principals raise serious questions as to whether the applicant possesses a responsible attitude toward his or her obligations as a broadcast licensee. *See Violation by Applicants of Laws of U.S.*, 42 FCC 2d 399 (1951). And, although the Commission generally does not inquire *in the first instance* into alleged violations of statutes or rules of other regulator agencies, *see Alan K. Levin*, 97 FCC 2d 1, 55 RR 2d 981 (Rev. Bd. 1984); *Country Broadcasting Co.*, 93 FCC 2d 83, 84, n. 3, 53 RR 2d 293, 294 n. 3 (Rev. Bd. 1983), preferring to leave such investigations to the agencies vested with primary jurisdiction over the violations, an analysis by the Commission of alleged unlawful behavior is required when, as here, the allegations are essentially undisputed, appear on their face to contravene the public interest, and call into direct question an applicant's basic financial qualifications. Thus, for example, the Commission has explored the underlying facts and circumstances even in the absence of a prior adjudication by the forum with primary jurisdiction where an applicant's president and largest stockholder failed to file his tax returns for a four-year period, *Indianapolis Broadcasting, Inc.*, 22 FCC 421, 440-441, 512-513, 12 RR 883, 892n-893, 946 (1957); where an applicant's sole owner twice failed to remit withholding taxes, *Noble Broadcasting Corp.*, 1 FCC 2d 154, 5 RR 2d 915 (1965); where two corporations in which an applicant's major stockholder held ownership interests failed over a three-year period to remit funds withheld from wages for social security taxes, *Country Broadcasting Co.*, 71 FCC 2d 1222, 45 RR 2d 551 (Rev. Bd. 1979); and where an applicant's vice president and 25% shareholder failed to file federal tax returns over a twenty-year period, *Henderson Radio, Inc.*, 83 FCC 2d 231 (ALJ 1980). *See also RKO General, Inc.*, 89 FCC 2d 297, 332-335, 50 RR 2d 1597, 1627-1629 (1982) (allegations of tax law violations required to be considered before license could be granted).

4. Here, when confronted in a motion to enlarge issues filed August 31, 1984 by Comserv Broadcast Group, Inc. (Comserv) with a copy of a

[2] Because the Section 307(b) issue may not ultimately be dispositive, the ALJ should follow "the better procedure" previously mandated by the Commission and set forth conclusions on the contingent standard comparative issue in his Supplemental Initial Decision. *See Voce Intersectario Verdad America, Inc.* FCC 85R-44, released May 30, 1985, n. 2.

federal tax lien against her, Ms. Garcia, the 50% general partner of Antonin & Garcia, acknowledged that she had not paid her income taxes for the years 1981 and 1982, and stated by way of explanation that she had assumed the relatively heavy costs of starting her own law practice during those years. Antonin & Garcia's Opposition to Motion to Enlarge, filed September 13, 1984. She added that the full amount of the taxes, including penalties and interest, had now been paid. *Id.* Finally, she stated that she had reviewed her financial obligations to the applicant and reaffirmed that she was qualified to meet them. *Id.* The ALJ, in denying Comserv's motion to enlarge, accepted Ms. Garcia's cursory explanation, adding that the satisfaction of the lien demonstrated sufficient conscientiousness to mitigate any adverse conclusions emanating from the lien. Memorandum Opinion and Order, FCC 84M-4219 (Corrected), released October 2, 1984. We are of the view, however, that amplification of this matter is necessary before Antonin & Garcia may be exonerated and its application granted, particularly since the lien was satisfied only after Comserv filed its motion to enlarge, and since its appears that Ms. Garcia may have deliberately chosen not to pay her taxes so that she could demonstrate the requisite financial qualifications to be awarded a broadcast license. *See Storer Communications, Inc.* v. *FCC*, No. 85-1246, slip op. at 14 (D.C. Cir. May 14, 1985), citing and quoting *LaRose* v. *FCC*, 494 F.2d 1145, 1146 n. 2 (D.C. Cir. 1974): "[A]gencies should constantly be alert to determine whether their policies might conflict with other federal policies and whether such conflict can be minimized."

5. Antonin & Garcia's broadcast application, signed by Ms. Garcia, contained a certification that the applicant was financially qualified to construct and operate the proposed facilities for three months without reliance on revenue. That certification was made at the very time that Ms. Garcia's federal income taxes remained unpaid. In light of representations by the applicant that Ms. Garcia has been contributing funds to meet half of the applicant's expenses and would share equally in all aspects of the station's operation, a substantial and material question is raised whether the above certification was correct at the time the application was filed and whether the applicant is, in fact, financially qualified. In this regard, we do not agree with Antonin & Garcia that because Comserv "has not the slightest idea of what [Antonin & Garcia's financial] plan might be," it has not met the pleading burden required of a party seeking additional issues (Reply to exceptions at 19). Under the Commission's current financial certification mechanism, a challenger will seldom have precise knowledge of what a competitor's financial plan is, and it would be an abdication of our qualifications approval responsibility if we were to immunize virtually every certificated financial proposal from scrutiny merely because a challenger could not describe an unreported proposal in

detail and point to its deficiencies. We are convinced that a movant has met his *prima facie* burden where, as here, he demonstrates that a principal upon whom the applicant is relying, at least in important part, to meet its financial qualifications is unable or unwilling to pay her taxes but at the same time has certified that the applicant is financially qualified. The reaffirmation by Ms. Garcia subsequent to her satisfaction of the lien that the applicant is financially qualified (see paragraph 4, supra) does not eliminate the factual questions that have been raised relating to Antonin & Garcia's original certification of its financial qualifications. *Cf. South Florida Broadcasting Co., Inc.*, 94 FCC 2d 452, 53 RR 2d 1683 (1983) (subsequent submission of a certification by an applicant not sufficient to resolve factual issue once a substantial and material question of fact arises). Appropriate issues therefore are warranted.

6. Finally, Antonin & Garcia reiterates its previously successful charge that Comserv's lack of diligence in raising these matters timely precludes a further evidentiary hearing. In denying Comserv's original issue enlargement pleading, the ALJ concluded that Comserv's motion based on the tax lien was untimely — it was filed on August 31, 1984[3] — because Comserv previously knew about the lien, having revealed it at the August 14, 1984 hearing session. FC 84M-4219, *supra*. Comserv asserts, however, that it only became aware of the lien on Friday, August 10 and was not allowed to inquire into this matter under the standard comparative issue. Comserv Exceptions at 15. As explained in paragraphs 3-5, *supra*, Comserv's allegations raise questions of probable decisional significance and such substantial public interest importance as to warrant their consideration even if untimely (see Section 1.229(c) of the Commission's Rules, 47 CFR 1.229(c)). Moreover, the Board is of the view that although Comserv's motion was filed at a late stage in this proceeding, this was a direct result of Antonin & Garcia's failure to promptly report the imposition of the tax lien to the Commission. Section 1.65 of the Rules, 47 CFR 1.65, requires applicants to keep their applications substantially accurate and complete in all significant respects and to report substantial changes as to any other matter that may be of decisional significance. Because the imposition of the tax lien raised questions as to Ms. Garcia's ability to operate a station in the public interest and as to the veracity of her financial certification and the applicant's financial qualifications, we believe that it was incumbent on Antonin & Garcia to report the lien as well as to answer the obvious financial and legal questions raised by it. Therefore, Section 1.65 and lack of candor issues will also be added. *See KOKA Broadcasting Co.*, 56 FCC 2d 191, 33 RR 2d 384 (Rev. Bd. 1975).

[3] The August 31 motion was filed approximately two weeks after the final hearing session; a second motion by Comserv was filed on September 25.

7. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED to the presiding Administrative Law Judge for adduction of evidence on the following issues and the issuance of a *Supplemental Initial Decision*:

(1) To determine the facts and circumstances surrounding the failure of Mary C. Garcia, a principal of Antonin & Garcia, to pay federal income taxes for the years 1981 and 1982;

(2) To determine whether Mary C. Garcia's November 8, 1982 certification of Antonin & Garcia's financial qualifications was false;

(3) To determine the facts and circumstances, including whether there has been a lack of candor, surrounding the failure of Antonin & Garcia to report, as required by Section 1.65 of the Commission's Rules, the existence of a federal tax lien levied against Mary C. Garcia;

(4) To determine whether Antonin & Garcia has sufficient funds available to construct and operate its proposed station;

(5) To determine, in light of the evidence adduced under the foregoing issues, the effect thereof on the basic or comparative qualifications of Antonin & Garcia to be a Commission licensee.

8. IT FURTHER ORDERED, That the burden of proceeding with the introduction of evidence on the above issues SHALL BE on Comserv Broadcast Group, Inc. and that the burden of proof SHALL BE on Antonin & Garcia.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

SEPARATE STATEMENT OF BOARD MEMBER BLUMENTHAL

In re: Las Americas Communications, Inc., *et al.*
MM Docket No. 85-115, *et al.*

I thoroughly endorse the action of my colleagues, most particularly that aspect of the order that compels inquiry into the failure of Mary Garcia, a New Jersey attorney, to report her failure to pay federal income taxes for the years 1981 and 1982, or to report the levy of tax liens for that failure. It is, to say the least, disturbing that a party seeking a hugely valuable privilege from the federal government apparently felt so little obligation toward her elementary duties of citizenship that her taxes should remain unpaid. More disturbing is the inescapable thought that a possible reason for her financial embarrassment was that she was prosecuting (or preparing to prosecute) her FCC application — a costly ordeal — on the

taxpayer's cuff.[1] This question must be explored at the remand hearing to determine any causal relationship.

The ALJ took the entire matter of Ms. Garcia's extended tax delinquency rather lightly (he ignored it),[2] but might have spared the remand had he heeded one cynical author's advice on the imperative of paying taxes. In the referenced novel, a seasoned felon is depicted as advising a novice hoodlum to pay income tax on the prospective booty; the veteran explains:[3]

> You're a young man, you can still learn. Pay attention to this. You can steal in this country, you can rape and murder, you can bribe public officials, you can pollute the morals of the young. You can burn your place of business down for the insurance money, you can do almost anything you want, and if you act with just a little caution and common sense you'll never be indicted. But if you don't pay your income tax, Grofield, you will go to jail.

While it may be true that the Commission has expressed interest in narrowing its purview over a broadcast applicant's "character,"[4] it has not yet gone so far as to celebrate the denizens of the Bastille, and it has certainly not declared an utter disinterest in whether broadcast applicants ignore federal laws. Nor is it likely to so long as Congress retains 47 U.S.C. §308(b). Although the law on whether or not the Commission will

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[1] Mrs. Garcia and her partner have averred that they have the substantial financial resources necessary to build and to initially operate the Newark, New Jersey radio station.

[2] From his recent order following the Board's remand, *see Further Prehearing Order*, FCC 85M-2718, released July 8, 1985, it seems the ALJ not only remains uncertain about the law, but also about the border between insouciance and insolence. *See id.* The former is understandable, (*see infra* note 5), but the July 8 order is merely the latest in a string of increasingly unprofessional documents published by him. *See e.g., T.P. Communications, Inc.*, FCC 85M-4524, released October 24, 1984 ("[t]his Commission is no longer concerned whether its licensee's are financial deadbeats or not"); *Mercury Broadcasting Co.*, FCC 84M-015, released January 4, 1985 (chaffing at Board's "errant pedantry" and "verbose dicta"); *Baytown Community Broadcasting Ltd.*, FCC 85M-158, released January 11, 1985 (advising litigant that reliance on recent Board decision was "wholly premature").

> Not familiar with the phenomenon of "bureaucratic burn-out," I note that the subject ALJ is eligible for retirement, after a long and distinguished career. Perhaps the ALJ should consider relieving his protracted bout of the miseries by seeking a milieu more conductive to a cheerful spirit.

[3] Donald E. Westlake, *The Score*, at 55-56 (Avon, ed. 1984).

[4] *See Notice of Inquiry on FCC Policy on Character Qualifications*, 87 FCC 2d 836 (1981). *See generally Alan K. Levin* 97 FCC 2d 1, 2-6 (Rev. Bd. 1984) (majority opinion), *modified in part*, FCC 85-130, released March 22, 1985 (Comm'n), *appeal pending sub nom. Levin* v. *FCC*, No. 85-1255 (D.C. Cir. 1985); *Leflore-Dixie, Inc.*, 57 RR 2d 1155, 1159-1160 (Rev. Bd. 1985) (majority opinion) (applications for review pending). *But compare Alan K. Levin*, 97 FCC 2d at 9 and *Leflore Dixie, Inc.*, 57 RR 2d at 1161 (separate statements).

take initial jurisdiction over violations of other laws could be more clear,[5] and the Commission is intending clarification,[6] the ALJ will — in the interim — duly apply the law as interpreted by the Board.

[5] *See Country Broadcasting Co.*, 93 FCC 2d 83, 84 n. 3 (Rev. Bd. 1983). Therein, the Board noted apparent unevenness in the case law relating to violations of non-FCC law.

[6] *See FCC Character Policy Inquiry, supra*, note 4.

FCC 84D-83

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Las Americas Communications, Inc. Newark, New Jersey	MM Docket No. 84-115 File No. BPH-821105AR
Frances Lawrence Antonin and Mary Garcia d/b/a Antonin and Garcia Jersey City, New Jersey	MM Docket No. 84-123 File No. BPH-821108AQ
Caprice Broadcasting Group, Inc. Newark, New Jersey	MM Docket No. 84-125 File No. BPH-821108AS
Comserv Broadcast Group, Inc. Newark, New Jersey	MM Docket No. 84-128 File No. BPH-821108AV
Multicultural Broadcasting, Inc. Newark, New Jersey	MM Docket No. 84-131 File No. BPH-821108BE
Glenn Scotland, d/b/a Coastal Communications Company Newark, New Jersey	MM Docket No. 84-134 File No. BPH-821108BH
Omnilingual Broadcasting, Inc. Newark, New Jersey	MM Docket No. 84-137 File No. BPH-821108BK
For Construction Permit for a New FM Station	

Appearances

Bruce Eisen on behalf of Las Americas Communications; Inc.; *Peter Gutmann* and *Vincent A. Pepper* on behalf of Frances Lawrence Antonin and Mary Garcia d/b/a Antonin and Garcia; *James A. Koerner* on behalf of Caprice Broadcasting Group, Inc.; *John C. Quale, Antoinette Cook,* and *James R. Bayes* on behalf of Comserv Broadcast Group, Inc.; *Margot Polivy* on behalf of Multicultural Broadcasting, Inc.; *James Nicholson, Thomas A. Hart,* and *Ralph Mittelberger* on behalf of Glenn Scotland d/b/a Coastal Communications Company; and *Barbara F. Feeherry, Richard F. Swift,* and *John F. Tierney* on behalf of Omnilingual Broadcasting, Inc.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
WALTER C. MILLER

Issued: December 13, 1984; Released: December 18, 1984

Preliminary Statement

1. Originally twenty-seven applicants applied for a construction permit to replace WHBI(FM)'s deleted facilities on 105.9 MHz (Channel 290), seven remain. Six of those seven proposed Newark, New Jersey as their city of license: (1) Comserv Broadcast Group, Inc.; (2) Las Americas Communications, Inc.; (3) Multicultural Broadcasting, Inc.; (4) Coastal Communications Company; (5) Caprice Broadcasting Group, Inc.; and (6) Omnilingual Broadcasting, Inc. The seventh applicant, Antonin and Garcia has designated Jersey City, New Jersey as its proposed city of license.

2. The Chief, Audio Services Division designated the case for hearing on February 13, 1984 (49 F.R. 6994 published February 24, 1984). After the interlocutory pleading cycle had run its course, two factual issues, and the ultimate conclusionary issue were left for resolution. The two factual issues are a 47 USC 307(b) issue, and a contingent standard comparative issue. The remaining issues read as follows:[1]

> "1. To determine: (a) the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient, and equitable distribution of radio service.
>
> 2. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

[1] In the interest of clarity, the remaining issues have been renumbered. This renumbering reflects the fact that basic qualifying issues against dismissed applicants have been deleted.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any."[2]

3. We firmed up the case for hearing at the May 22, 1984 prehearing conference. An evidentiary admissions session was held on July 23, 1984, and the hearings took place on August 13, 14, and 15, 1984. The Presiding Officer closed the record on September 27, 1984 (FCC 84M-4185). The applicants filed their proposed findings of fact and conclusions of law on October 17, 1984, and except for Caprice and Omni, filed their replies on October 26, 1984. Caprice and Omni elected to file no replies.

Findings of Fact

Issue 1(a) - Areas and Populations

4. No significant coverage difference exists in the seven proposals, and the number of existing services to any given portion of any applicant's proposed service area far exceeds five. The parties have so stipulated. So the reception facets of 47 USC 307(b) aren't involved.[3]

Issues 1(b) - The Fair and Equitable Distribution of Radio Service

5. *Newark, New Jersey.* Newark (1980 population - 329,248), the county seat of Essex County, is located in the northeastern section of New Jersey about 10 miles west of New York City. Although it remains the largest city in New Jersey, Newark's population has been steadily declining. It had 439,000 people in 1950, 381,930 in 1970, and 329,248 people in 1980. The population is 58.3% Black, 32.6% White, and 18.6% Hispanic. One of the city's large subgroups is the Portuguese community. Its 30,000 people represent among 10% of the city's population. Nearly two-thirds of the Hispanic population are Puerto Rican. The median age for a Newark resident is 27 years. 34% of Newark's population is under 17 years of age, while 9% is over 65.

6. Newark, an incorporated city with its own municipal government and services, covers 24 square miles. It has a Mayor-Council form of government. The Council is a policy-making body, while the separately elected mayor is authorized and responsible for government administration. The Mayor appoints a Business Administrator to direct the Department of Administration. There are 18,406 full-time city employees, including 1,565 police officers.

7. Since it is the county seat of Essex County, Newark is the site of the County's offices, courts, business, and service activities. The Essex

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[2] The Presiding Officer fails to understand the significance of the words "if any." Certainly the Chief never framed an issue or issues which would permit the disqualification of all 27 original applicants.

[3] Thus we will look to the fair and equitable aspects of 307(b) and not to the efficiency factors.

County Park system operates five recreation facilities and two major public parks. Newark itself operates 55 small parks totalling 150 acres. Newark has six hospitals, 310 places of worship, representing 53 denominations, and civic organizations commensurate with a city of over 300,000 people. This includes, the greater Newark Chamber of Commerce, the Urban League of Essex County, and Renaissance Newark, Inc.

8. The city headquarters the nation's largest (Prudential), and fifteenth largest (Mutual Benefit) insurance companies, the country's eleventh largest utility (Public Service Gas and Electric), New Jersey Bell, and the state's four largest banks. The five top employers in Newark are the New Jersey University of Medicine and Dentistry, the Prudential Insurance Company, Western Electric, Public Service Electric and Gas Company, and Rutgers University/Newark. The Newark Airport has just opened a new terminal, and Port Newark handles 30% of all shipping in the New York area, and the largest volume of auto importing in the country.

9. Newark plans new development. It will include Prudential's completing a 550,000 square foot office building, a 187-acre industrial park on the old railroad yards, and a 330,000 square foot office/hotel complex that the Port Authority intends to build along the Passaic River.

10. Despite the presence of this industrial and business activity (paras. 8-9 *supra.*) private employment declined in all of Newark's job sectors between 1972 and 1982. In 1982 the Newark labor force was comprised of 124,753 jobs. This represented a 28.7% job loss from 1972. Median household income in Newark was $10,118 in 1979. 31.9% of all the Newark households had income below the poverty level in 1980. Housing is predominantly rental (78.9%). 25% of the housing units are one and two family units, while 48.0% are structures with five or more units.

11. Like the city's population (para. 5 *supra.*) the public school enrollment in Newark's Essex County has been steadily declining. In 1969-70 there was 176,800 students. This declined to 170,400 students in 1974-1975, and fell to 157,500 in the 1978-1979 school year. As of 1979, Newark had about 18,700 students enrolled in four-year colleges and universities; i.e., in Rutger's Newark campus, New Jersey College of Medicine and Dentistry, New Jersey Institute of Technology, and the Seton Hall School of Law. 16% of Newark's residents attended college.

12. Newark has a daily newspaper, the *Newark Star Ledger.* It has a circulation of 432,110 Monday-Friday, 398,062 on Saturday and 631,735 on Sunday. It has been in existence since 1917. Turning to the all-important factor of broadcast transmission services, there are two AM stations (WNJR and WSKQ), three FM stations (WHTZ, WBGO, and WFME), and two TV stations (WWHT on Channel 68 and WNET on Channel 13)

licensed to Newark. In addition, Newark and Essex County receive cable television service from Connection Communications Corporation.

13. *Jersey City, New Jersey.* Jersey City (1980 population - 223,172), the county seat of Hudson County, is located in the northeastern section of New Jersey contiguous to Newark and across the Hudson River from Manhattan. Hudson County is an SMSA unto itself. Although it remains the second largest city in New Jersey, Jersey City's population has been steadily declining. Between 1950 and 1980, its population declined from 299,000 people to its present 223,172. The population is 58.4% White, 27.7% Black, and 18.7% Hispanic. One of Jersey City's recently settled ethnic communities is the Filipino community. It has about 6,000 people (about 3% of the city's population). About two-thirds of the Hispanic population are Puerto Rican. The median age for a Jersey City resident is 29.7 years. 29% of Jersey City's population is under 17 years of age, while 12% is over 65.

14. Jersey City, an incorporated city with its own municipal and government services, covers 14 square miles. It has a Mayor-council form of government. There are 7,858 city employees, including 1,565 police officers and 738 firemen. Jersey City owns and operates its own water and its own sanitary sewer system.

15. The largest park within Jersey City is Liberty State Park with 800 acres, only 35 of which have been developed to date. There are also two county parks, and 55 municipal parks. These 55 municipal parks include one city park, eight playfields/pools, eleven community parks, twenty-five playgrounds/miniparks and ten passive squares. Jersey City has 108 places of worship representing 41 denominations. There are five hospitals located there. The Jersey City public library system consists of twelve branches and occupies 157,000 square feet of space. It also has civic organizations commensurate with a city of about 225,000 people. This includes the Hudson County Chamber of Commerce, United Way, Rotary, and the Knights of Columbus.

16. The largest employers in Jersey City are the U.S. Postal Distribution (4,000 employees), the Jersey City Board of Education (3,000), the City of Jersey City (2,900), Colgate Palmolive (2,000), the Jersey City Medical Center (1,700) and New Jersey Bell (1,000).

17. Jersey City plans new development. It plans to: redevelop Liberty State Park; initiate efforts to have Jersey City designated as an urban enterprise zone; redevelop major parcels of land along the western shore of the Hudson River; promote residential rehabilitation and historic preservation; link the city to Manhattan and Staten Island with a fiber optic telecommunications network; establish a major science and technology center; and promote Jersey City as a movie and media center.

18. Despite the presence of this industrial and business activity (paras. 16-17 *supra.*), Jersey city has experienced a declining job base. In 1982 the Jersey City labor force was comprised of 90,000 jobs. Between 1972-1982 Jersey City lost 15,000 jobs — a 22% drop. Median household income in Jersey City was $12,787 in 1979. 20% of all the Jersey City households had incomes below the poverty level in 1980. Housing is predominantly rental (72%). 39% of Jersey City's housing units are one and two-family units.

19. Like the city's population (para. 13 *supra.*) the public school enrollment of Jersey City's Hudson County has been steadily declining. In 1969-1970 there was 89,200 students. This declined to 88,600 students in 1974-1975, and fell to 84,300 students in the 1978-1979 school year. As of 1979, Jersey City had about 13,500 enrolled in four-year colleges and universities; i.e., in Jersey City State College, and St. Peter's college. Jersey City is also the home of Hudson County Community College and Hudson Vocational School. 21% of Jersey City's residents attended college.

20. Jersey City has a daily newspaper, the *Jersey City Journal.* It has a circulation of 63,618 Monday-Friday, and 59,715 on Saturday. The *Journal* doesn't print a Sunday edition. There are no broadcast facilities, radio or television, commercial or noncommercial, licensed to Jersey City. Based on its population the Jersey City SMSA is ranked 84th. The average number of radio stations in markets 80-90, excluding Jersey City, is thirteen stations per market. Every one of the other top 360 SMSAs, down to those having populations of only 50,000, have at least two radio stations.

Intermediate 307(b) Findings

21. Newark, New Jersey (1980 population - 329,248), and Jersey City, New Jersey (1980 population - 223,172) face 307(b) need problems that are similar yet different. Both cities stand in the shadow of "The Big Apple." Even though Newark is the largest city in New Jersey, and Jersey City, the second largest, they have had to struggle to maintain and project their separate identities. But the record evidence shows that each has succeeded. Each city has been able to resist being swallowed up by The New York City megalopolis. So, as communities with their own personality, and with their own sets of needs, they have earned the right to a full 307(b) analysis. Stated another way, the Commission should decide the case on the basis of the 47 USC 307(b) issue it has designated, and it should fairly and equitably distribute 105.9 mHz (Channel 290) to the more deserving community.

22. Like many other northeastern cities, Newark and Jersey City have experienced substantial population declines over the last 30 years due to a loss of housing units and decreasing household size. Each seeks to blunt those population declines and reverse the declining job base in their cities.

Both are county seats of their respective counties. Newark is the County Seat of Essex County, while Jersey City fulfills the same rule for Hudson County. Each is trying to capably perform that role. So, on the surface, many of their problems are similar.

23. Yet the problems are different. Each seeks to unify a different population mix. Newark's population is primarily Black (53.8%) with a substantial White minority (32.6%), while Jersey City's population is primarily White (58.4%) with a substantial Black minority (27.7%). Both cities have a Hispanic population of over 18.5%, about two-thirds of which is Puerto Rican. Moreover, Jersey City must try to integrate a recently settled Filipino ethnic community of 3,000 (3% of its population) while Newark must react to the needs of 30,000 people (about 10% of its population) in the Portuguese "Ironbound District."

24. Newark, with its larger population and area exudes a greater regional significance, but this is offset somewhat by Jersey City's more ambitious development plans (compare para. 17 with para. 9 *supra.*). Newark must fight inner city decay, while Jersey City must battle a burgeoning crime rate.

25. In sum, both communities have individual 307(b) needs, and both could use the mass media and the broadcast stations located in their respective cities to try to meet those needs. And this brings us to the decisionally significant difference between the two communities. Newark has ample transmission outlets available to it. It has two standard broadcast stations licensed to it, WNJR(AM) and WSKQ(AM); it has three FM stations licensed to it, WHTZ(FM), WBGO(FM), and WFME(FM); and it has two TV stations licensed to it, WWHT (Channel 68), and WNET (Channel 13). Thus there are available to Newark's residents several outlets for local self-expression.

26. Jersey City is far less fortunate. It has no broadcast facilities, radio or television, commercial or noncommercial, licensed to it. The record shows that it is the largest community in the country without a first local transmission outlet. In terms of population, the Jersey City SMSA ranks 84th. Every one of the other top 360 SMSAs, even those having populations of only 50,000, have at least two outlets for local self-expression, outlets that enable time to address their 307(b) needs, and help them maintain their identity. This then is the crux of it: Jersey City (1980 population - 223,172) should get a first local radio transmission outlet before Newark is given a sixth such outlet.

Issue 2 - The Contingent Standard Comparative Issue

Description of the Applicants

27. *Antonin and Garcia.* Antonin and Garcia is a general partnership. Frances Lawrence Antonin and Mary Garcia are each a 50% general partner.

28. *Comserv Broadcast Group.* Comserv, a New Jersey corporation, has two classes of stock: Class A common stock (voting stock) and Class B common stock (nonvoting stock). The following chart sets out the details of Comserv's ownership.

CHART

Name of Stockholder	*Office*	*Director*	*% Ownership* *Class A*	*Class B*
Cecil R. Forster, Jr.	President and Chairman of the Board	Yes	49.75%	None
Sonya Suarez	Vice-President, Treasurer and Vice-Chairman of the Board	Yes	49.75%	None
Charles J. Hamilton, Jr.	Vice-Preident, Secretary	Yes	0.5%	33.2%
Stuart J. Beck	None	No	None	33.4%
W. Don Cornwell	None	No	None	33.4%

29. *Multicultural Broadcasting, Inc.* Arthur Liu is the President and sole stockholder of Multicultural, a New Jersey corporation.

30. *Las Americas Communications, Inc.* The following chart sets out the ownership details on Las Americas, a New Jersey corporation:

CHART

Name of Stockholder	*Office*	*Director*	*% of Ownership*
Luis Raul Bernard	President	Yes	63%
Luis M. Rodriguez	Vice-President	Yes	10%
Thomas Mendez	Controller	Yes	8%
Carlos Knauth			7%
Georgina Falu	Secretary/Treasurer	Yes	6%
Melba Falu			6%

31. *Glenn Scotland d/b/a Coastal Communications Company.* Glenn F. Scotland is the sole proprietor of Coastal.

32. *Caprice Broadcasting Group, Inc.* Although Caprice, a New York corporation, claims that all of its stockholders hold corporate offices, in certain instances, it has failed to adduce evidence on what those offices are. The following chart sets out the details on Caprice's principals:

CHART

Name of Stockholder	*Office*	*Director*	*% of Ownership*
Arlen Kantarian	(Unspecified)	Yes	88%
Kay Arman	(Unspecified)	Yes	3%
Dr. Alex S. Edwards	(Unspecified)	Yes	3%
Alan Chadrjian	Treasurer	Yes	3%
John Mancuso	Vice-President	Yes	3%
Jack Chadrjian	Vice-President	No	None

33. *Omnilingual Broadcasting, Inc.* The following chart sets out the ownership details on the Omnilingual corporation:[4]

[4] The Presiding Officer struck the biographical and integration statements of six of Omnilingual's nine principals because they failed to appear at the hearing for cross-examination. However, at page 5 of its Proposed Findings, Omnilingual asks that official notice be taken of its ownership structure as set out in its application. That request IS GRANTED. While Omnilingual will receive no integration credit for its absent witnesses, it would be misleading not to set out an accurate ownership picture for the corporation. The Chart also contains a column that shows which principals were present at the hearing.

CHART

Name and Address	*Office*	*Director*	*% of Ownership*	*Hearing Participation*
Gerard A. Forlenza Montclair, N.J.	President	Yes	37.5%	Present
H. James Sondheim Easton, CT.	Vice-President	Yes	17.5%	President
Tommaso Salomone Bronx, N.Y.	Secretary/Treasurer	Yes	10.0%	Absent
Laszlo Kalman New York, N.Y.			10.0%	Absent
Lefteris Hadjioannou Woodhaven, N.Y.		Yes	5.0%	Absent
Romas Kezks Bayside, N.Y.		Yes	5.0%	Absent
Adolfo Fermoselle Wantagh, N.Y.			5.0%	Present
Ghazi Khankan Long Beach, N.Y.			5.0%	Absent
Alfredo Rendeiro Union, N.J.			5.0%	Absent

Diversification of Mass Media

34. Neither Antonin and Garcia, Comserv, Las Americas, Coastal, Caprice, nor Omnilingual hold cognizable media interests.[5]

35. Multicultural's owner Arthur Liu has been involved in the SCA business the last eight years. Liu and his wife, jointly own Sino Radio Broadcasting Corp., the operator of a full-time commercially supported Chinese language radio service. Sino Radio broadcasts on a subcarrier frequency of WHTZ-FM, Newark, New Jersey, a Class B FM station broadcasting from the Empire State Building, and covering the New York metropolitan area. Liu sells commercial time for his programs like a regular radio station, and he estimates that his SCA service has a listenership of 50,000 to 100,000 people.

[5] The claims that Comserv principals, Cecil Forster, Stuart J. Beck, and W. Don Cornwell and Caprice's Jack Chadrjian hold cognizable media interests are rejected.

36. Liu is also President and 18% owner of Sino Broadcasting Corp. Sino Broadcasting operates a Chinese language SCA service on an SCA channel of Station KDFC-FM, San Francisco. That SCA operates on the same basis as the New York SCA. Although Liu couldn't estimate the audience for the San Francisco service, the Chinese population of San Francisco is about 300,000, the same as that in the New York area.

37. Next, Liu and his wife jointly own 24.5% of a proposed ITFS venture, C.S. Television, Inc. C.S. Television is developing a Chinese language subscription television service for distribution in the New York metropolitan area. The facility will run on a subscription basis similar to over-the-air pay TV services.

38. Finally Liu and his wife jointly own an 80% interest in Greater Chinatown Publishing Inc. Greater Chinatown publishes the *Sino Daily Express*, a daily Chinese language newspaper with a circulation of 25,000 to 27,000 people. It serves the New York metropolitan area.

Integration of Ownership With Management

39. *Antonin and Garcia.* Antonin and Garcia claims 100% integration of ownership with management. It intends to integrate both general partners into the proposed station's day-to-day operations.

40. Antonin and Garcia will fully integrate 50% partner, *Frances Lawrence Antonin*, into its daily operations. Antonin will work a minimum of 40 hours a week as a Program Director. As Program Director she will be responsible for the programming to be broadcast. She will have no superior at the station. She and the other 50% General Partner will make all the important or significant business decisions together. Except for the years 1966-1970, she has lived in Jersey City (the proposed community of license) all her life.

41. Frances Lawrence Antonin was born in Jersey City in 1945. After high school she received a Bachelor of Arts in Psychology from Bloomfield College, Bloomfield, New Jersey in 1965. She then worked briefly as a service representative for the New Jersey Bell Telephone Company. From 1966 to 1974 she was employed as a systems engineer for IBM Corporation. However, during part of the same time period she started attending Seton Hall University School of Law. She attended law school from 1971 to 1976 (taking maternity leave in 1973 and 1974) and earned her Juris Doctor degree in 1976.

42. Ms. Antonin engaged in the private practice of law from 1976 to 1984. During the same time period (from 1976 to 1979) she was assistant county counsel for Hudson County, and assistant corporation counsel for Jersey City (from 1981 to 1984). On January 18, 1984, Antonin became a Judge of the Jersey City Municipal Court. Upon her appointment she gave up her private practice. She is the second black woman and the second black person to serve as a full-time Judge in the Jersey City Municipal

Court. She will resign immediately if Antonin and Garcia are granted the construction Permit.

43. Ms. Antonin is civically active in Jersey City. She is: on the Board of Directors of Action for Sickle Cell Anemia; Vice-President of the Urban League Guild; a member of the New Jersey Coalition of 100 Black Women; member of the Board of Trustees and Parents Association of the Bergen School; a Westside Little League Parent; a member of the Association of Black Woman Lawyers; a member of the Claremont-Lafayette Presbyterian Church; and a member of the Urban League Guild of Hudson County. She has received several awards and honors since she was appointed to the Bench in January, 1984.

44. She claims qualitative integration enhancement because she is a Black female.

45. Antonin and Garcia will also fully integrate the other general partner, *Mary Garcia*, into the station's daily operations. She will work a minimum of 40 hours a week as General Manager. In that capacity she will supervise all areas of station operation except for its programming. She has resided in Jersey City since January, 1982.[6]

46. Mary Garcia was born in Brooklyn, New York in 1952. After graduating from high school, she earned a Bachelor of Arts Degree from Rutgers University, Newark College of Arts and Sciences in 1975. She then enrolled in law school and received a Juris Doctor degree from Rutgers Law School, Newark, New Jersey in June, 1978.

47. From September 1978 until June 1979 she was a judicial clerk for Judge Samuel C. Scott, Jersey City. Since 1979 she has engaged in the general practice of law in Jersey City. One of her major clients is the Jersey City Parking Authority. She serves as the Authority's general counsel. Ms. Garcia intends to give up her private practice if and when the partnership is granted a construction permit.[7]

48. Ms. Garcia currently serves on the Ethics Committee of New Jersey for Hudson County, The Attorney Disciplinary Board serving Hudson County located in Jersey City, and the Pro Bono Program of the Legal Aid Society of Hudson County, Jersey City. She is a member of the Jersey City chapter of the National Organization of Women, the Hispanic Bar Association, and the Hudson County Bar Association.

49. Mary Garcia also claims qualitative integration enhancement because she is an Hispanic female.

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[6] There is a question whether Ms. Garcia has resided in Jersey City since September 1981 or since January 1982. For integration purposes she is being credited with the latter date. But the difference in the two dates is not decisionally significant.

[7] She may retain her position as general counsel of the Parking Authority since it only involves about 2 or 3 hours of work per week and pays $15,000 a year.

50. *Comserv Broadcast Group.* Comserv claims 99.5% full-time, and 0.5% part-time quantitative integration. It intends to integrate the three principals who own Class A voting stock into the station's day-to-day operations.[8]

51. Comserv will fully integrate its President, Chairman of the Board of Directors, and 49.75% Class A stockholder, *Cecil R. Forster, Jr.*, into the station's day-to-day operations. Forster will work a minimum of 40 hours as General Manager. In that capacity he will establish station policy, insure that the station complies with all applicable laws and regulations, make the staffing and personnel decisions, and implement the station's EEO program. He will directly supervise the station manager, the business and legal affairs manager, the controller, and all other department heads. He will make the program decisions, and supervise the station's public service and community affairs activities. He resides in New York City, but will move to Newark, New Jersey if Comserv is awarded the construction permit.

52. Cecil R. Forster, Jr., was born in Brooklyn, New York in 1943. After graduating from high school he attended Middlebury College and graduated in 1964 with a BA degree in Political Science. He then entered St. John's University School of Law. He graduated in 1967 with a Juris Doctor degree.

53. He then went with the Irving Trust Company in their Lending Officers Training Program. In the spring of 1968, Forster was called to active duty in the United States Marine Corps. He served both stateside and in Vietnam. He was a certified Judge Advocate, and a Military Judge. In 1969-70, while serving in Vietnam, Forster was decorated with the Navy Commendation Medal with Combat V. He served three years in the Marines. From 1974 through 1981, Forster also served as an Equal Opportunity Consultant to the Marine Corps Commandant.

54. After leaving the Marines, Forster joined the law department of Pepsico, Inc. Eventually he became Vice-President, Secretary, and Counsel for the Pepsi Cola Metropolitan Bottling Company. In the fall of 1974, he became the Vice-President-Business Affairs for Westinghouse Broadcasting Company, and three years later, he was appointed Vice-President and General Manager of Radio Station WINS, New York. He held that position until 1980. Mr. Forster has been and still is a member of the Board of Trustees of the American Federation of Television and Radio Artists.

55. In 1981, Forster joined Unity Broadcasting Company, Inc. where he is presently employed. There he is responsible for processing and coordinating five cellular mobile radio telephone system applications and

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[8] One of the Class A stockholders, Charles J. Hamilton, Jr., also holds 33.2% of the Class B non-voting stock. See Finding 28 *supra.*

for Unity's involvement in building a non-wireline cellular telephone system.

56. Cecil Forster claims a qualitative integration enhancement because he is a Black male.

57. Comserv will also integrate Vice-President, Treasurer, Vice-Chairman of the Board, and 49.75% Class A stockholder, *Sonya Suarez*, into the station's day-to-day operations. She will devote at least 40 hours a week to the position of Station Manager. In that capacity Ms. Suarez will assist the General Manager in overseeing all aspects of station operation. She will implement station policy daily, and supervise the Advertising Sales Manager, the Program Manager, the Engineering Manager, and the Marketing department. She will primarily focus on the marketing aspects of the station's operations. Ms. Suarez resides in New York City, but will move to Newark, New Jersey if Comserv is awarded the construction permit.

58. Sonya Suarez was born in New York City in 1950. She received a BA degree in Theatre from the State University of New York at Albany in 1972. She began her broadcast career in December 1973 with the Westinghouse Broadcasting Company (Group W). From 1973-1975 she was the Assistant Promotion Manager for WBZ Radio, the Boston Group W station; then from 1975-1977 she served as the Advertising/Sales Promotion Manager for KDKA, Pittsburgh; and finally, from 1977-1980, she served as Advertising/Sales Promotion Manager for WINS, Group W's New York City station.

59. Ms. Suarez left Westinghouse in 1980 and joined Warner Amex Satellite Entertainment Company (WASEC), a cable programming division of Warner Communications and the American Express Company. She was with WASEC from July 1980 to October 1982. As a member of the Marketing team, Ms. Suarez held the positions of Vice-President and Director of Creative Services, and Vice-President of Affiliate Relations. She is currently an Independent Communications/Marketing Consultant.

60. Sonya Suarez claims a qualitative integration enhancement because she is a Hispanic female.

61. Comserv also intends to integrate Vice-President, Secretary, Director, and 0.5% Class A stockholder, *Charles J. Hamilton, Jr.*, into the station's day-to-day operations. Hamilton will devote at least 20 hours per week to the position of Business and Legal Affairs Manager. In that capacity, he will supervise all corporate affairs including tax matters; he will be responsible for properly filing with and reporting to government agencies that have jurisdiction over the station; and he will be responsible for complying with federal, state, and local regulations. In addition, Hamilton will prepare and review the station's business contracts, and

structure and implement appropriate labor relations policies and equal employment opportunity guidelines. He resides in Larchmont, New York.

62. Charles J. Hamilton, Jr. was born in Pittsburgh, Pennsylvania in 1947. After he obtained an AB *cum laude* in government from Harvard in 1969, he received the Henry Russell Shaw Fellowship for graduate travel and study abroad. From 1970 to 1971, Hamilton traveled in Scandinavia, Western Europe, and East Africa and served as a research associate at the Delos Symposium in Athens, Greece.

63. When he returned to the United States, Hamilton enrolled in Harvard Law School. He received his Juris Doctor degree in 1975. During academic year 1973-1974 he was also a full-time graduate student in the Massachusetts Institute of Technology's master's degree program. So in 1975 he also received a Master's Degree in City Planning.

64. From 1975 to 1977, Hamilton was associated with the law firm of Pillsbury, Madison and Sutro in San Francisco, California. He specialized in commercial and labor litigation. From 1977 to 1979, he was an Associate Counsel for The Equitable Life Assurance Society of the United States headquartered in New York City. In 1979, he became associated with his current law firm of Battle, Fowler, Jaffin & Kheel. He became a partner in the firm in 1983.

65. In addition, Hamilton is the Impartial Arbitrator and Chairman of the Impartial Disciplinary Review Board for the New York City Transit Authority; a member of the Visiting Committee of the Board of Overseers of Harvard College from 1978 to the present; a member of the Public Policy of the Board of Directors of the Advertising Council, Inc. from 1974 to present; and a member of the Fellowship Selection Committee of the Board of Directors of the Whitney M. Young, Jr. Memorial Foundation, Inc. from 1979 to the present.

66. Charles J. Hamilton, Jr. claims a qualitative integration enhancement because he is a Black male.

67. *Multicultural Broadcasting, Inc.* Multicultural claims 100% quantitative integration of ownership with management. It intends to integrate its President, and sole stockholder, *Arthur Liu* into the proposed station's day-to-day operation. Liu would be the Chief Executive and General Manager devoting at least 40 hours a week to those duties. Mr. Liu has lived in New York City since 1967. He currently resides at 255 Twenty Third Street.

68. Arthur Liu, a naturalized American citizen was born in China in 1936. When the communists came to power in 1948, the Lius fled to Taiwan. During the next seventeen years Liu completed high school, graduated from college at National Taiwan University, and fulfilled his army obligation. He also married and raised a son. Liu came to the United States in 1965.

69. Mr. Liu started his broadcasting career when he was in high school. He wrote a series of newspaper articles on popular music. While attending National Taiwan University he worked as an air personality and disc jockey at various radio stations. When he was in the Army he presented a weekly radio program on the Broadcasting Corporation of China's Station, the National Taiwanese network. In 1961, Liu joined the BBC at its Taipei facility. He produced and presented his own popular music program, edited the network's weekly "Listener's Magazine", and when the Taiwan Television Company was formed, he became a television producer, while still maintaining his daily BBC radio program.

70. Upon coming to the United States, Liu enrolled in Syracuse University's Master of Science in Radio and Television Program. He received his Masters degree in 1966, and joined ABC-TV the following year as an audience research analyst. He transferred to ABC films as a senior research analyst in 1968, moved to a similar position with MGM-TV in 1969, and as the assistant director of research at Storer Television Sales from 1970-1972.

71. From 1972-1981, Liu operated Sino Communications Group, Inc., distributing Chinese Language programs from Hong Kong and Taiwan to cable systems in the United States and Canada. As previously noted, for the past eight years, Liu has primarily been involved in his SCA businesses, his Chinese language subscription TV venture, and his Chinese language daily newspaper. See Findings 35-38 *supra.*

72. Arthur Liu claims a qualitative integration enhancement because he is an Oriental male.

73. *Las Americas Communications, Inc.* Las Americas claims 100% full-time quantitative integration. It intends to integrate all six of its stockholders into the proposed station's day-to-day operations. See Finding 30 *supra.*

74. First, Las Americas will integrate its President, Director, and 63% stockholder, *Luis Raul Bernard* on a daily basis. He will devote at least 40 hours a week to the position of Station Manager. In that capacity, and although he owns 63% of the stock, he will not be the station's number 1 operating officer. He will report to the General Manager. As Station Manager, Bernard will coordinate and supervise the department heads and act as the liaison between them and the General Manager. Bernard resides in the Bronx, but he intends to move to Newark if Las Americas is granted the CP.

75. Luis Raul Bernard was born in Puerto Rico. But he has lived in New York City for the past 32 years.[9] From 1973 to 1978 he spent about two hours a week working with the producer of a weekly radio show, and

[9] The background material that Las Americas has presented on Luis Raul Bernard, in fact the background material it has presented on most of its principals is sketchy at best.

for about the past 10 years he has produced musical shows for radio and TV based on Puerto Rican folkloric music.

76. Since 1981 Bernard has owned and operated Otoao Record Company International. Otoao has two retail record and music stores, one in Manhattan, and one in the Bronx. His wife helps manage the business. While Bernard presently devotes about thirty hours a week to the stores, his wife will assume those duties if Las Americas is granted the CP.

77. Bernard claims a qualitative integration enhancement because he is an Hispanic male.

78. Next, Las Americas will integrate its Vice-President, Director, and 10% stockholder, *Luis M. Rodriguez,* into the proposed station's day-to-day operations. He will work at least 40 hours a week as General Manager. In that capacity he will directly supervise the Station Manager who will report to him on the inner workings of the station. He will advise the Station Manager and other Department heads, will have the power to hire and fire employees.

79. Luis M. Rodriguez was born in Puerto Rico. But he has lived in the Bronx for the past 40 years. He intends to move to Newark if Las Americas is granted the CP.

80. Rodriguez owns a company that prepares newspaper and radio advertising. His advertisements are broadcast over four stations and placed in two Hispanic newspapers in the New York City area. He will terminate that business if Las Americas is granted.

81. Rodriguez started his broadcast career in 1948 with Station WLIB, New York, New York as a sales representative and copy writer. He remained with WLIB until 1950. Then for six years he worked at Station WWRL, New York as a radio announcer, disc jockey and music librarian. He then moved on to Station WBNX, New York. There he hosted a Latin Musical show, a show that was broadcast four and one-half hours a day, six days a week. For the past 13 years Rodriguez has produced and hosted a musical entertainment program on Station WJIT(AM), New York. That program is broadcast eight hours each Sunday. He will terminate that position if Las Americas is granted.

82. In 1981, Escuila de Arte, Musica e Literatura, a New York City area civic association, named Mr. Rodriguez "Broadcaster of the Year." And on February 1, 1982, the New York State Legislature passed a resolution congratulating him for "his humanitarian efforts and his dedication to the Hispanic community through the media." Rodriguez claims a qualitative integration enhancement because he is an Hispanic male.

83. Next, Las Americas will integrate its Controller, Director, and 8% stockholder, *Thomas Mendez,* into the station's day-to-day operations. He will work at least 40 hours a week as the station's Business Manager. In

that capacity he will oversee all financial matters, supervise the station's bookkeeper, and hire and supervise the sales staff. He will report directly to the Station Manager.[10] Mendez presently resides in Puerto Rico. He has owned a home there for the last four years.[11] He intends to terminate his present employment and move to Newark if Las Americas gets the grant.

84. Mendez was born in Puerto Rico. He is a Certified Public Accountant, and has clients there. For the last five years Mendez has been employed as a general accountant for the Government Employees Association of Puerto Rico where he handles accounts receivable and financial statements. Thomas Mendez claims a qualitative integration enhancement because he is an Hispanic male.

85. Las Americas also intends to integrate 7% stockholder *Carlos Knauth* into the proposed station's day-to-day operations. Knauth will work at least 40 hours a week as Program Director. He will develop and maintain the station's program format and oversee the station's on-air staff. He will participate in the station's programming surveys. Knauth will report directly to the Station Manager. He has lived in New York City for the past 22 years, but he will move to Newark if Las Americas is awarded a CP.

86. Knauth was born in Nicaragua, and he got his first broadcast experience there. From 1957-1960 he worked at several Nicaraguan radio stations as an announcer, copywriter, and newscaster. After he came to this country he was employed at WBNX, New York City as a full-time announcer. He also assumed the duties of program director, and supervised the station's program format. Knauth worked at WBNX from 1965 to 1971.

87. From 1968 to 1970 he studied broadcasting at the International TV Arts School in New York City. Knauth went from WBNX to WADO(AM), New York in 1971. He worked there as an announcer until 1974. Mr. Knauth claims a qualitative integration enhancement because he is an Hispanic male.

88. Next, Las Americas intends to fully integrate its Secretary/Treasurer, Director, and 6% stockholder, *Georgina Falu*, into its day-to-day operations. Ms. G. Falu will serve at least 40 hours a week as the station's public affairs director. In that role she will create and coordinate a public awareness program for the station, develop the public affairs programming and public service announcements, and institute and accomplish the station's ongoing ascertainment of community needs. She will supervise at least one assistant and report directly to the Station Manager. Ms. Falu has lived in New York City for the past nine years, but she intends to move to Newark if Las Americas is granted.

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[10] Mr. Mendez is the Station Manager's (Mr. Bernard's) brother-in-law.

[11] Mr. Mendez's wife has worked as a Librarian for the past 14 years in Puerto Rico.

89. Georgina Falu was born in Puerto Rico. Since 1980 she has been an Associate Professor at the State University of New York, Long Island. She teaches accounting two days each week. She will terminate that employment if Las Americas is granted. Georgina Falu claims a qualitative integration enhancement because she is an Hispanic female.

90. Finally, Las Americas will integrate 6% stockholder *Melba Falu* into its proposed day-to-day operations. Mr. M. Falu will work at least 40 hours a week as News Director. She will supervise a local news gathering staff, and, in concert with the General Manager, and Station Manager, recruit news personnel. She will report directly to the Station Manager. She has lived in New York City for the last eight years, but she will move to Newark if Las Americas is granted.

91. Melba Falu was born in Puerto Rico. She began her broadcasting career in 1973 as hostess for the Caribbean version of "Soul Train" on WAPA-TV, San Juan. In 1974 she produced and hosted a music and talk program on WVOZ(AM), San Juan. During 1974-1975, Ms. Falu worked for Astra Productions in San Juan selling commercial time for radio and television stations.

92. When she first came to this country she lived in Trenton, New Jersey. There, in 1976, she served as producer-hostess for several television programs concerning women's problems on New Jersey Public Television. In that same year she attended the Allen and Singer Broadcasting School in Trenton. She then served as an assistant producer for the Mass Media Department of the New York State Department of Education.

93. Since November, 1979, Ms. Falu has hosted a five-hour morning program on WADO(AM), New York City. She received an M.A. in Media from the New School for Social Research of New York City in 1982. Melba Falu claims a qualitative integration enhancement because she is an Hispanic female.

94. *Glenn Scotland d/b/a Coastal Communications Company.* Glenn Scotland claims 100% quantitative integration credit. As sole proprietor he will work at least 40 hours a week as General Manager of the proposed station. As its chief operating officer, Scotland will make all the programming, sales, management, and budgetary decisions. He will establish and supervise both personnel and general office practices; he will coordinate relations with the community; and he will supervise all subordinate section heads.

95. Scotland was born in East Orange, New Jersey in 1955. He resided there from 1955 to 1973, and again from 1980 to the present time. After high school and Prep School, Scotland attended Brown University from 1973-1977. He graduated from Brown with a Bachelor of Arts degree in Economics. From there he went on to the Georgetown University Law

Center in Washington, D.C. (1977-1980). Following his graduation from law school in May, 1980, Scotland joined the law firm of Kraft and Hughes in Newark, New Jersey. There he specializes in public finance.

96. Scotland belongs to the American Bar Association, the New Jersey State Bar, and the Garden State Bar Association - the last consisting of Black lawyers within New Jersey. Glenn Scotland claims a qualitative integration enhancement because he is a Black male.

97. *Caprice Broadcasting Group, Inc.* Caprice claims 97% full-time and 3% part-time quantitative integration. It purports to integrate four of its five stockholders full-time, and the other part-time[12] into its day-to-day operations.

98. First, Caprice asserts that it will integrate the 88% owner and Director, *Arlen Kantarian* into the station's day-to-day operations. Kantarian claims he will be the full-time General Manager. He says he will have ultimate responsibility for all facets of the station's operation, including programming, sales, and finances. Kantarian resides in Rye, New York.

99. Kantarian is a graduate of Georgetown University School of Business, and has an MBA from New York University Graduate School of Business. Kantarian was formerly with the Pepsi-Cola and Colgate Palmolive Companies. He is presently the Director of Marketing of National Football League Properties, Inc.

100. Caprice's opponents have attacked the *bona fides* of Kantarian's integration claim. They point out that he doesn't know what his voting power in Caprice is; that he had no primary responsibility for preparing and prosecuting Caprice's application, but that his counsel, Jack Chadrjian, did;[13] that his counsel prepared documents that were submitted to the FCC without showing them to him; and that his counsel (Chadrjian) produced a document on discovery that contained information he (Kantarian) was unaware of.

101. Kantarian's integration claim will be disallowed. The Presiding Officer has no reason to doubt Kantarian's 88% ownership claim. He therefore previously rejected the contention that Jack Chadrjian is an undisclosed principal in Caprice. See citation at Footnote 13 *supra*. But crediting Kantarian's assertion that he will devote at least 40 hours a week to the day-to-day operation of the station would be going too far. Arlen Kantarian has shown little or no interest in prosecuting Caprice's application. He doesn't know what's going on. He left everything up to his counsel who just happens to be his stepfather. He has no knowledge of

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[12] Like Las Americas (see Footnote 9 *supra*.), the salient comparative information on Caprice is skimpy at best. See e.g. para. 32 *supra*.

[13] Jack Chadrjian, Caprice's local counsel, is Kantarian's stepfather. Also see FCC 84M-3869 released September 10, 1984.

Caprice's proposed operation and has shown no inclination to learn.[14] In brief, the Presiding Officer isn't convinced that Kantarian even wants to live up to his integration pledge.[15] He certainly hasn't displayed any intention of doing so (Tr. 901-902, 906, 911, 926-928, and 930-931).

102. Caprice also intends to integrate 3% stockholder, and Director, *Kay Arman* into the station's proposed day-to-day operations as Program Director. She will devote at least 40 hours a week to that position. She will be in charge of the programming broadcast on the station. She will select the material to be broadcast, schedule programs and commercial announcements, and select, record, and broadcast public service announcements. Ms. Arman resides in New York City.

103. Kay Arman had radio, television, recording, movie, and concert experience as a singer and an actress. She is entitled to a qualitative integration enhancement because she is a white female.[16]

104. Next, Caprice intends to integrate 3% stockholder, and Director, *Alex S. Edwards*, into its day-to-day operations as the Director of Community Relations. Caprice contends that Edwards will spend at least forty hours a week meeting with leaders of various ethnic groups to determine their needs and interests, and will work with the General Manager and Program Director to develop or secure programming responsive to those needs. Edwards resides in New York City.

105. Alex Sahagian-Edwards spent over 25 years in the medical profession before he retired. He has about 3 years of broadcast experience. He does a radio interview program in which he discusses health-related programs and interviews people in the medical field.

106. Edwards will not be given full integration credit. It strains credulity to believe that a retired Doctor is going to spend 40 hours a week, day-in-day-out, week-in-week-out, meeting with the leaders of various ethnic groups. Dr. Edwards himself admits that he could perform those duties in 20 hours (Tr. 957-959). Accordingly, he will be credited with part-time integration.

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[14] This is not to suggest that Kantarian is incapable of learning the broadcast field. He has an excellent educational background, and appears to be a successful businessman.

[15] Disallowing Arlen Kantarian's integration claim is of no great moment. Caprice couldn't prevail in a comparative hearing even if his claim were credited. Caprice is composed of too many nonresident, inexperienced, civically inactive white males. That type of organization shouldn't get involved in a comparative case. It is only throwing good money after bad. But it was warned. See FCC 84M-908 released February 24, 1984 at para. 17.

[16] In several instances the Presiding Officer has made findings that place Caprice in an even more favorable light than those Caprice itself has requested. See Caprice Proposed Findings paras. 36-43 *supra*. In fact, one gets the idea Caprice didn't put out much of an effort in preparing its proposed findings of fact.

107. Next, Caprice intends to integrate its Treasurer, Director, and 3% stockholder, *Alan Chadrjian*, into its day-to-day operations as Business Manager. He will devote at least 40 hours a week to his position. As Business Manager, A. Chadrjian will be in charge of the station's financial affairs. He will oversee the budgeting, expenses, bill-paying, and banking. He resides in Cedar Grove, New Jersey.

108. Alan Chadrjian graduated from Bucknell University with a degree in Business Administration. He is a candidate for a Masters Degree in that field. He is presently employed as an Assistant Cashier and Branch Manager for a New Jersey bank. A. Chadrjian concedes he made no contribution to the prosecution of Caprice's application prior to his deposition which was taken on May 16, 1984 (Tr. 890, 895). Nevertheless his integration pledge will be credited.

109. Finally, Caprice claims it will integrate its Director, Vice-President, and 3% stockholder *John Mancuso* into its day-to-day operations as Sales Manager. Mancuso will devote at least 20 hours a week to that position. As Sales Manager, he will supervise the station's salesmen, and will do sales himself. He will solicit accounts, assist in the preparation of copy, if required, and aid in collecting accounts receivable. Mancuso resides in Roslyn, New York.

110. John Mancuso owns a plumbing contracting business and a finance company. He has sales management experience.

111. *Omnilingual Broadcasting, Inc.* Originally Omnilingual claimed 95% full-time and 5% part-time quantitative integration. It indicated that 8 of its 9 stockholders would devote at least 40 hours per week to the station's day-to-day operations in a supervisory capacity; and that the ninth stockholder, Alfredo Rendeiro (5%), would devote at least 20 hours a week to being Associate Program Director.

112. But, as previously noted (Finding 33, and Footnote 4 *supra.*), Omnilingual was unable to present witnesses to support this claim. Instead it only presented witnesses to support a 60% quantitative integration claim.[17]

113. Omnilingual intends to integrate its President, Director, and 37.5% stockholder *Gerard A. Forlenza* into its proposed day-to-day operations. Forlenza will devote at least 40 hours a week to being General Manager. He resides in Montclair, New Jersey, and has lived there for 20 years.

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[17] As in the case of Caprice (see Footnote 15 *supra.*) disallowing 40% of Omnilingual's integration claim is of no great moment. Like Caprice, Omnilingual is composed of too many nonresident, inexperienced, civically inactive white males. Consequently it hasn't ever been a comparative force in this proceeding. But it was warned. See FCC 84M-908 released February 24, 1984, at para. 17.

114. Forlenza is a graduate engineer. He has B.S. and Ch.E. Degrees from Columbia University, and holds professional engineer's licenses from New Jersey, New York, and Texas. He has been President and Chief Operating Officer of Beker Industries and President and General Manager of the chemical divisions of American Cyanamid Co. He is presently self-employed, but would resign from his other position to fulfill his 40 hour commitment here.

115. Next, Omnilingual intends to integrate its Vice-President, Director, and 17.5% stockholder *H. James Sondheim* into the proposed station's day-to-day operations. Sondheim will work at least 40 hours a week as Station Manager. In that capacity he will select and monitor all programming, supervise the station's sales, and oversee the production of all on-air material. He has lived in Easton, Connecticut for the past six years.

116. H. James Sondheim was born on May 17, 1921 in New York City. He holds a BA from Columbia, and an MBA degree from New York University. He has extensive broadcast experience: he spent 8 years as the Promotion and Community Affairs Director for WAAT-AM, FM, and TV, Newark, New Jersey; he organized and operated the QXR FM network for the New York Times; and from 1965 to 1973, he was Manager of Special Program Sales, and an account executive for NBC.

117. After leaving NBC, Sondheim became the Sales Manager for Compunet, a Control Data subsidiary. Currently, he is the Marketing Director for WJIT. He will terminate that position if Omnilingual's application is granted.

118. Finally, Omnilingual intends to integrate 5.0% stockholder, and Director[18] *Adolfo Fermoselle* into the station's proposed day-to-day operations. Fermoselle would work at least 40 hours a week as an Associate Program Director and Production and Continuity Director. In this capacity he will co-supervise and participate in "managerial decisions concerning the production and broadcast of programming." He lives in Wantagh, New York.

119. Adolfo Fermoselle was born on May 6, 1934, in Lincoln, Argentina. He has lived in New York State for about 22 years and has been a United States citizen since March 4, 1983. He has a degree in Economic Science from the University of Buenos Aires.

120. Fermoselle has a varied background. He has worked as a radio technician for the United States Navy; he has owned a travel agency; he has engaged in the accounting business; and he has been in radio production and broadcasting. Since 1964 Fermoselle has been a producer

[18] Fermoselle claims to be a Omnilingual Director. See Omnilingual Exhibit 7. But Omnilingual's application doesn't support that claim. See Finding paragraph 33 and Footnote 4 *supra*.

and announcer for Station WHBI, Newark, New Jersey. There he has produced and hosted a Spanish language program. The program consists of Argentine music, news, sports, commentary, and interviews. Fermoselle includes information from and contacts with the Argentine Chamber of Commerce, the Argentine Consulate in New York City, the Argentine Embassy in Washington, D.C., and the Organization of American States.

121. To the extent his present employment or business interests interfere with his 40 hour commitment to Omnilingual, Fermoselle will resign from these activities. Adolfo Fermoselle claims a qualitative integration because he is an Hispanic male.

Auxiliary Power

122. Antonin and Garcia, Comserv, and Omnilingual propose to install auxiliary power generation equipment. The others do not.

Preliminary Conclusions

1. Seven mutually-exclusive applicants seek authority to operate on 105.9 MHz (Channel 290). Six of them proposed Newark, New Jersey as their city of license: (1) Comserv Broadcast Group, Inc. (Comserv); (2) Las Americas Communications, Inc. (Las Americas); (3) Multicultural Broadcasting, Inc. (Multicultural); (4) Coastal Communications Company (Coastal) (5) Caprice Broadcasting Group, Inc. (Caprice); and (6) Omnilingual Broadcasting, Inc. (Omnilingual). The seventh applicant, Frances Lawrence Antonin and Mary Garcia d/b/a Antonin and Garcia, proposes to operate on Channel 290 in Jersey City, New Jersey.

2. The parties have adduced evidence on two factual issues: (1) the designated 47 USC 307(b) issue; and (2) the *contingent* standard comparative issue.

The 47 USC 307(b) Issue

3. We must decide the 307(b) issue first. For it is only if 307(b) isn't determinative that the *contingent* comparative issue comes into play.[19] See *FCC v Allentown Broadcasting Co.*, 349 US 358, 361-362, 75 S. Ct. 855, 858 (1955), and *Robert J. Reverman et. al.* 78 FCC 2d 1110 (Rev. Bd. 1980), review denied FCC 80-739, released December 11, 1980.

4. Under 47 USC 307(b) the Commission must distribute licenses among communities so as to provide a fair, efficient, and equitable distribution of radio service.[20]

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[19] Note however that comparative findings have been made. See Findings 27-122 *supra*. It is only comparative conclusions that aren't required. See *WFPG, Inc.*, 33 FCC 1962 at para. 13; *Alkima Broadcasting Co.*, 30 FCC 932 (1961) at Footnote 2; and *Sayger Broadcasting Co.*, 32 FCC 492 (1962) at Footnote 7.

[20] 47 USC 307(b) reads: "In considering applications for licenses, and modifications, and renewals thereof, when and insofar as there is a demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation and of power

5. *The Legal Framework.* Over the years the Commission has implemented 307(b) in part by releasing rule-making and policy statements that set out its allocation objectives and priorities. In 1982 they issued such a statement for FM service. See *FM Channel Policies/ Procedures*, 90 FCC 2d 88 (1982). There, at 91-92, the Commission laid down three 307(b) priorities: (1) bringing a first full-time aural service (elimination of white areas); (2) bringing a second full-time aural service (elimination of grey areas) or first local service (first local transmission outlet); and (3) fulfilling other public interest criteria. We must analyze the 307(b) evidence that has been adduced in terms of these legal priorities.

6. *Analysis.* There are two aspects to 47 USC 307(b), the "efficiency" aspects (reception service), and the "fair and equitable" aspects (transmission service). See *Kent-Ravenna Broadcasting Co.*, 22 RR 605, 610-611 (1961) and *Wilmer E. Huffman, et. al.*, 32 FCC 1 (1962), paras. 9-11. First: no 307(b) preference is warranted under the "efficiency" standard. The parties have stipulated that no significant coverage differences exist among the seven proposals, and there is a plethora of oral services available to the reception areas involved (see Finding 4 *supra.*). So no one would eliminate either a "white" or "grey" area, and the Commission's first and part of its second FM priorities would not be met.

7. However, when we analyze the "fair and equitable" evidence that has been adduced, we see that Antonin and Garcia's Jersey City proposal clearly stands out. See Intermediate Findings 21-26 *supra.* Both Jersey City and Newark, with their own personalities and their own sets of needs, have earned the right to 307(b) consideration.[21] But Antonin and Garcia would bring a first local transmission service to Jersey City (population 223,172) while each of the other six applicants would only bring a sixth aural transmission and a ninth broadcast outlet to Newark (population - 329,248). Thus the Commission's second priority would be met by granting the Jersey City applicant.

8. Moreover, a grant of Antonin and Garcia would harmonize with past Commission precedent. See e.g. *Beaufort County Broadcasting Company*, 94 FCC 2d 572, 575-577 (Rev. Bd. 1983), *reconsideration denied*, 83 R-73, released September 29, 1983, *review denied* FCC 84-284, released June 19, 1984; *Robert J. Reverman et. al. supra.*; *Lawton-Fort*

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among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

[21] See *Jupiter Associates, Inc.*, 12 FCC 217 (1968). There the Review Board held that Elizabeth, New Jersey (1960 population - 107,698) was separate and distinct from both adjacent Newark and New York City, and therefore qualified for a transmission outlet. Also see *Jersey Cape Broadcasting Corp. (WCMC)*, 2 FCC 2d 942 (1966) where the Commission held that Wildwood, New Jersey was separate and distinct from Atlantic City.

Sill Broadcasting Co., 7 RR 1136 (1953); *Plainview Radio*, 31 FCC 529, 21 RR 885 (1961); and *Utica Observer-Dispatch, Inc.*, 11 FCC 383, 3 RR 265 (1946).

9. Unquestionably granting Antonin and Garcia's application would more fairly and equitably distribute radio service in the State of New Jersey. The record shows that, by a very wide margin, Jersey City is the largest community in the country without a local transmission outlet. The average number of aural stations licensed to comparably sized markets is thirteen. So we have a 307(b) ill that cries for a cure. This proceeding provides an ideal opportunity to administer that cure.

Ultimate Conclusions

10. There is no need to make conclusions on the *contingent* comparative issue. The contingency never came to fruition. The 307(b) evidence establishes that Jersey City, New Jersey has a greater need for its first local transmission outlet than Newark, New Jersey has for its sixth such outlet. Consequently, a fair, efficient, and equitable distribution of radio facilities under 47 USC 307(b) mandates a grant of Antonin and Garcia's application.[22]

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, the application of Frances Lawrence Antonin and Mary Garcia d/b/a Antonin and Garcia (BPH-821108AQ) IS GRANTED; and

The applications of Las Americas Communications (BPH-821105AR), Caprice Broadcasting Group, Inc. (BPH-821108AS), Comserv Broadcast Group, Inc. (BPH-821108AV), Multicultural Broadcasting Inc. (BPH-821108BE), Coastal Communications, Inc. (BPH-821108BH), and Omnilingual Broadcasting, Inc. (BPH-821108BK) ARE DENIED.[23]

FEDERAL COMMUNICATIONS COMMISSION

WALTER C. MILLER, *Administrative Law Judge*

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[22] This is not to suggest that Antonin and Garcia could not prevail under the standard comparative issue. Their 100% quantitative integration, strengthened by both partners' local residence and civic participation, enhanced by both partners' minority and female participation in the proposed station's top two positions, and augmented by their auxiliary power proposal presents a formidable standard comparative applicant indeed.

[23] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

Comparative Coverage Issue
Comparative Criteria
Diversification of Control of Mass Media
Ownership, Multiple, Factor in Applications

Applicant with three radio stations given slight diversification preference over applicant with nine stations. This preference overcomes minimal residence preference and preference for providing service to an 8% larger population overall and a fifth nighttime service to 1,285 people.

—Mark L. Wodlinger

MM Docket No. 84-1084

FCC 85R-62

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In re Applications of	
Mark L. Wodlinger Naples Park, Florida	MM Docket No. 83-1084 File No. BPH-810814AB
Robyn E. Gerry Naples, Florida	MM Docket No. 83-1085 File No. BPH-820128AL
Williams County Broadcasting Systems, Inc. Naples, Florida	MM Docket No. 83-1087 File No. BPH-820129AM
Nathan L. Goetz Golden Gate City, Florida	MM Docket No. 83-1089 File No. BPH-820129AV
Juarez Communications Corporation Naples Park, Florida	MM Docket No. 83-1091 File No. BPH-820728AL

For Construction Permit for a New FM Station

Appearances

Michael R. Miller, Esq., on behalf of Mark L. Wodlinger; *James L. Oyster, Esq.*, on behalf of Robyn E. Gerry; *Thomas C. Henry, Esq.*, on behalf of Williams County Broadcasting System, Inc.; *Jerrold Miller, Esq.*, on behalf of Nathan L. Goetz; *John A. Borsari, Esq.*, on behalf of Juarez Communications Corporation; and *Norman Goldstein, Esq.*, on behalf of the Mass Meida Bureau, Federal Communications Commission.

DECISION

Adopted: July 26, 1985; Released: August 6, 1985.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD MEMBER BLUMENTHAL;

1. This proceeding involves the mutually exclusive applications of Mark L. Wodlinger (Wodlinger), Robyn E. Gerry (Gerry), Williams County Broadcasting Systems, Inc. (Williams County), Nathan L. Goetz (Goetz), and Juarez Communications Corporation (Juarez) for authority to construct a new FM broadcast station on Channel 288A. Wodlinger and Juarez propose Naples Park, Florida, as their community of license, Gerry and Williams County propose Naples, Florida, and Goetz proposes Golden Gate City, Florida. By a *Hearing Designation Order*, released October 13, 1983, the above-captioned applications (along with three others that were subsequently dismissed) were designated for a consolidated hearing to determine, pursuant to section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. 307(b), which of the proposals would best provide a fair, efficient, and equitable distribution of radio service, and on a contingent comparative issue. Also a limited financial issue and an air hazard issue were designated against various of the applicants.

2. In an Initial Decision ("*I.D.*"), FCC 85D-4, released January 15, 1985, Administrative Law Judge Edward Luton concluded that Naples Park and Golden Gate City, both of which were seeking a first local transmission service, were to be preferred under Section 307(b) to Naples, which already has four local aural stations. The ALJ further determined that nothing in the record concerning either Naples Park or Golden Gate City indicated that either had a greater need for the station at issue in this proceeding than the other, and that consequently no preference was due to either community under Section 307(b). The ALJ therefore concluded

that the choice of the prevailing applicant must be made among the three applicants proposing Naples Park or Golden Gate City (Wodlinger, Juarez, and Goetz) under the standard comparative issue. Under that issue, the ALJ determined Wodlinger was the preferred applicant. He determined that Juarez was very slightly better than Wodlinger with regard to diversification of control, and that Wodlinger in turn was slightly better than Goetz. He determined that Wodlinger and Goetz were equal in their proposals for integration of ownership and management, and that both were substantially superior to Juarez. The ALJ concluded that Wodlinger's substantial preference over Juarez under the integration criterion overcame Juarez's very slight preference under the diversification criterion. Since he also found Wodlinger to be superior to Goetz with regard to diversification while being equal with regard to integration, he found Wodlinger to be the preferred applicant overall, and consequently awarded the construction permit to him. The ALJ also concluded in his *I.D.* that Williams County, one of the applicants proposing to serve Naples, had not demonstrated it had sufficient financial qualifications to support its proposal.[1]

3. This proceeding is now before the Review Board on exceptions filed by Goetz and 'contingent' exceptions filed by Wodlinger. None of the other three applicants have excepted to the *I.D.* or filed comments on the exceptions that were filed.[2] The Board has reviewed the *I.D.* in light of the exceptions and replies, the oral argument held May 30, 1985, supplemented briefs filed on June 18, 1985, at the Board's request, and our independent examination of the record. We adopt the *I.D.*'s findings of fact and conclusions of law, except as modified herein, and affirm the ALJ's ultimate conclusion that grant of Wodlinger's application would best serve the public interest, convenience, and necessity.

4. *Section 307(b) Issue.* Neither of the two applicants proposing Naples as their community of license excepted to the ALJ's conclusion that both Naples Park and Golden Gate City are entitled to a preference over Naples under Section 307(b) of the Communications Act, 47 U.S.C. §307(b). We therefore do not need to address that portion of the ALJ's determination. Both of the excepting applicants have objected, however, to his determination that neither Naples Park nor Golden Gate City is

[1] The ALJ resolved the remaining financial and air hazard issues against the other applicants in their favor.

[2] On March 25, 1985, Wodlinger filed motions requesting that Williams County's and Juarez's applications be dismissed for failure to prosecute pursuant to Section 1.276 and 1.277 of the Commission's Rules, 47 C.F.R. §1.276 and §1.277. Section 1.276(f) provides that if any party fails to file exceptions within the specified time to an initial decision which proposes to deny its application, its application may be dismissed with prejudice for failure to prosecute. We will grant Wodlinger's motions and dismiss Williams County's and Juarez's applications.

entitled to a Section 307(b) preference over the other. Naples Park and Golden Gate City are unincorporated communities of approximately the same size located in the vicinity of Naples, Florida. *I.D.*, paras. 10, 13; Tr. 26. In 1980, the "Census Designated Place" ("CDP") denominated "Naples Park" had a population of 5438, while the 1980 Census showed that Golden Gate City had a population of 4327. *I.D.*, paras. 10, 13. The ALJ found that the Naples Park CDP encompassed a larger area than the generally recognized boundaries of Naples Park. *Id.*, para. 44. He consequently concluded that the population of Naples Park was some undetermined figure less than 5438. Comparing this circumstance with Golden Gate City's unchallenged 1980 population of 4327, the ALJ decided that neither could be considered to be the "most populous" community for Section 307(b) purposes. *Id.*, paras. 45-46. He also found that the two places were quite similar with regard to their political, cultural, religious, social, and commercial attributes. *Id.* para. 47. The ALJ consequently concluded that, since there was no significant population difference between the two communities, nor any other differences in community attributes which would indicate that one had a greater need for the proposed station than the other, no preference under Section 307(b) was warranted.

5. Wodlinger excepts to the ALJ's finding that Naples Park is not coterminous with the Naples Park CDP. The ALJ found the "traditional" boundaries of Naples Park to be Bluebill Avenue and 111th Street on the north, Vanderbilt Beach Road on the south, Route 41 on the east, and Gulf Shore Road on the west. *I.D.*, paras. 10, 44. This area constitutes over three quarters of the Naples Park CDP; it excludes a subdivision called Vanderbilt Beach, which lies between the western boundary of Naples Park and the Gulf, and an apparently sparesely populated area along the Gulf Coast north of Vanderbilt Beach. *Id.*; Wodlinger Exh. 5. Wodlinger argues that the "traditional" boundaries include all the CDP except the undeveloped northern strip, and that in any case Wodlinger intended that his proposed community should be coterminous with the CDP.

6. The record supports the ALJ's characterization of Naples Park; his findings with respect to the boundaries of Naples Park are based, in part on Wodlinger's own testimony, Wodlinger Exh. 3, and they are indeed the same boundaries put forth by Wodlinger in his proposed findings of fact.[3] The ALJ also relied on other evidence, such as atlas listings and real estate listings, indicating that Naples Park and Vanderbilt Beach are considered locally to be separate areas. *I.D.*, para. 44. Record citations which Wodlingers says show that Vanderbilt Beach is integrated into the Naples Park community (Wodlinger Contingent Exceptions, para. 13) do not support this contention.

[3] Proposed Findings of Fact and Conclusions of Law of Mark T. Wodlinger at 6.

7. Furthermore, the Commission does not rely exclusively on U.S. Census classifications in determining whether an area is a "community" for Section 307(b) purposes. *FM Channel Assignment* (North Naples, Florida), 41 RR 2d 1549, 1553-54 (1977); *see also Mighty-Mac Broadcasting Company*, FCC 85R-53, released June 26, 1985, at n. 2; *Debra D. Carrigan*, 58 RR 2d 111, 113 (Rev. Bd. 1985). Here, even if the Naples Park CDP could qualify as a "community," Wodlinger's minor ambiguity as to exactly what his community of license is to be should be read narrowly against him. The ALJ's use of the "traditional" boundaries for Naples Park instead of the Naples Park CDP in evaluating the community was therefore proper, although no decisional impact on the Section 307(b) issue results. Thus, while Wodlinger claims that Naples Park is larger than the area found by the ALJ, Goetz claims it is smaller, urging that the western boundary is Vanderbilt Drive and not Gulf Shore Road, using the former road as a boundary would reduce Naples Park somewhat, but would still leave it with about three quarters of the populated area of the CDP. Further, Goetz conceded that the area he would exclude as being part of Vanderbilt Beach is essentially a resort area with a very low year-round occupancy rate compared to what he considers to be Naples Park proper. Goetz Exh. 1, p. 49. However, even using Goetz's own calculation, exclusion of the area he considers to be Vanderbilt Beach would reduce the Naples Park population to 4079, a figure not significantly different than the 4,327 population of Golden Gate City. (Goetz Exceptions at p. 3). The record therefore supports the ALJ's conclusion, *I.D.*, para. 45, that the 1980 population of Naples Park is somewhat less than the 5,438 people reported for the Naples Park CDP, and that the differences in the populations of Naples Park and Golden Gate City are not of decisional significance under Section 307(b).

8. Goetz also argues that the ALJ erred in his determination (*I.D.*, para. 47) that Naples Park and Golden Gate City are similar in their political, cultural, religious, social, and commercial attributes. Goetz bases his claim primarily on information about Golden Gate City which he placed in the record and showing Golden Gate City to be an active community. Goetz failed, however, to provide any corresponding information about Naples Park which would allow a comparison between the two communities. Hence, Goetz's collection of newspaper articles about Golden Gate City is valueless, since there is no evidence the local media does not give equal (or even perhaps greater) attention to Naples Park.[4] The evidence that is in the record which permits a comparison of the two communities

[4] Goetz excepts to the ALJ's proper refusal to admit these newspaper articles for the truth of the matter contained therein. Such material, when offered for the truth of the matter contained, is pure hearsay, and was not admissible. *See* C. McCormick, *The Law of Evidence*, §225 (1954).

indicates that both are recently-established, developing sun-belt communities, possessing the attributes that could be expected of such communities. Ordinarily, in choosing between two communities under Section 307(b), where both have the same existing level of broadcast services, the community with the larger population is presumed to have the greater need for the service. This presumption can, however, be overcome by a showing that the communities possess various other attributes which demonstrate the smaller community has a greater need. *See, e.g., Affinity Communications, Inc.*, 96 FCC 2d 685, 686-87 (Rev. Bd. 1984); *Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 709-10 (Rev. Bd. 1982). But, the record does not indicate that there is any significant population difference between the two communities, nor does it show differences in other community attributes which would show that one community has a greater need than the other. Accordingly, the ALJ properly determined that neither Naples Park nor Golden Gate City was entitled to a preference over the other under Section 307(b).[5]

9. *Comparative Issue: Diversification of Control.* The ALJ found that Goetz had an interest in seven broadcast stations, while Wodlinger had an interest in only two. He concluded, in consequence, that Wodlinger was entitled to a diversification preference over Goetz. The record reflected that Wodlinger is chairman of the board and fifty percent shareholder of Wodlinger Broadcasting Company, licensee of KCLO-AM and KZZC-FM, both in Leavenworth, Kansas. Wodlinger's wife, Constance J. Wodlinger, is president and owner of the other fifty percent of the shares of Wodlinger Broadcasting Company. *I.D.*, para. 21. Since, for diversification purposes, one spouse's media interests are attributed to the other, *Absolutely Great Radio, Inc.*, 95 FCC 2d 1023, 1026 (1983); *Alexander S. Klein*, 86 FCC 2d 423, 425-27 (1981), Mr. Wodlinger is charged with the 100% ownership of both of these stations. By *Order*, 84M-3664, released August 22, 1984, the ALJ accepted an amendment to Wodlinger's application reporting the grant to Mrs. Wodlinger of a construction permit for a low power television station at Houston, Texas, effective June 30, 1984. And, subsequent to the release of the instant *I.D.*, Mrs. Wodlinger was also awarded a construction permit for a new Class C FM broadcast station at Miramar, Florida, a community located just over one hundred miles from Naples Park. This latter grant became final on

[5] On May 29, 1985, Goetz filed a Request for Official Notice asking the Board to recognize what purports to be April 1, 1985, population estimates for various communities in Collier County, Florida. No figure is given for Naples Park. The source of the data is apparently an office in the Collier County government, about which we know nothing. Notice may not ordinarily be taken of information of this sort. *See Fed. R. Ev.* 201(b). *See also* K. Davis, *Administrative Law Text*, §§15.09-15.10 (3d Ed. 1972) *Cf.* §556(e) of the Administrative Procedure Act, 5 U.S.C. §556(e). Consequently Goetz's request will be denied.

May 1, 1985.[6]

10. Mr. Goetz, on the other hand, is the president, director, and fifty percent shareholder of Goetz Broadcasting Corporation, licensee of WFAW and WSOY, located in Fort Atkinson, Wisconsin; WDLB and WLJY, located in Marshfield, Wisconsin; and WNBK, located in New London, Wisconsin. Goetz Broadcasting holds 50.1% of the stock of Sauk Broadcasting Company, which holds licenses for WRDB and WRDB-FM in Reedsburg, Wisconsin. *I.D.*, para. 35. By *Order* 84M-4333, released October 11, 1984, and *Order*, FCC 84M-4691, released November 6, 1984, the ALJ accepted amendments to Goetz's application reporting, respectively, that an application for transfer of control of Stations WIXN and WIXN-FM, Dixon, Illinois, to Goetz Broadcasting Company and Sauk Broadcasting Corp. had been filed and that the transfer had been consummated.[7]

11. Whereas Wodlinger is charged with the ownership of three radio broadcast stations, plus one low-power TV station. Goetz must be charged with ownership interests in nine radio broadcast stations. He possesses negative control over at least seven. All of the stations owned by either Wodlinger or Goetz are located a substantial distance from Naples Park and Golden Gate City; the closest is the Miramar, Florida station recently acquired by his wife. Goetz argues that Wodlinger should be given a comparative demerit since Wodlinger is charged with three radio stations, plus a lower-power TV station, while Goetz has only a twenty-to-fifty percent interest in nine stations. Goetz contends that the ALJ failed properly to consider the relative extent of the respective interests of Goetz and Wodlinger and (before us) the proximity of the Miramar FM station.

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[6] On April 15, 1985, Wodlinger filed a statement pursuant to Section 1.65 of the Commission's Rules reporting that an order had been released on April 1, 1985, granting his wife's application. On May 29, 1985, Wodlinger filed a "Petition for Leave to Amend" stating that the grant had become final and asking that an amendment to Wodlinger's application reporting this fact be accepted. We will grant Wodlinger's petition. An engineer's statement attached to the amendment states that distance between the Miramar and Naples Park Transmitter sites is 102.7 miles and that the clearance between the 1.0 mV/m contours is at least fifty miles. On May 14, 1985, Goetz filed a "Motion to Supplement Record" in which Goetz asked that the record be supplemented to show that the distance between the Naples Park and Miramar transmitter sites is 102.63 miles and the distance between the reference points in the two communities is 100.52 miles. Goetz submits an engineer's statement to support these figures. We will grant Goetz's motion to the extent of accepting this statement.

[7] Since Goetz exercises negative control of both Goetz Broadcasting and Sauk Broadcasting, it follows that he exercises negative control over these two stations as well. Goetz states simply that he owns a twenty percent interest in the two Dixon stations. (Goetz Exceptions at 7) Goetz also owns fifty percent of three movie theaters in Monroe, Wisconsin. I.D. Para. 35. but provides no information about the ownership structure.

12. We note initially that only minimal weight for diversification purposes will be given Mrs. Wodlinger's low-power television station in Houston. In establishing the rules governing the Low Power Television Service, the Commission noted that that service's viability was unknown and its competitive impact on other telecommunication services was believed to be insignificant, though it could not be accurately predicted. *Low Power Television Service*, 51 RR 2d 476, 513 (1982). The Commission also noted that its concern over anticompetitive impact is lessened when the station is, like LPTV, both secondary (*i.e.*, may not cause interference to full service stations and is subject to interference from them) and inherently limited in its coverage potential. *Id.*, at 515. Furthermore, there is nothing in the record here to indicate that the low power television station in question has any significant diversification impact, since it is located many hundreds of miles away from the proposed community of license.

13. We also reject Goetz's contention that it is of decisive significance that Wodlinger has an attributable 100% interest in his stations while Goetz has a lower level of ownership in the stations in which he has an interest. Concededly, there is some comparative difference between the two levels of ownership. However, Goetz possesses *negative control* over at least seven of the stations in which he has an interest, and he would remain Chairman of the Board of Goetz Broadcasting and director of Sauk Broadcasting (Goetz Exh. 2, p. 1). Given the level of control that Goetz has, and will retain in the numerous stations in which he has an interest, the fact that Goetz has a lower percentage of ownership is not, in and of itself, of outstanding significance, though it must be taken into account. *Berryville Broadcasting Co.*, 70 FCC 2d 1, 14 (Rev. Bd. 1978).

14. We also disagree significantly with Goetz's claim that Wodlinger's nearby Miramar station must be given disproportionate weight here. The distance of the existing media interests to the proposed community of license is, of course, one of several factors which are considered in determining whether a preference for diversification is warranted; and if so, how strong that preference should be. *See e.g.*, *Old Time Religion Hour, Inc.* 95 FCC 2d 713, 724-5 (Rev. Bd. 1983), *recon. denied*, 96 FCC 2d 551 (Rev. Bd. 1984). *Ottumwa Broadcasting Company*, 92 FCC 2d 1011 (Rev. Bd. 1982), relied upon Goetz to support his claim that he is entitled to a diversification preference, at most would support a conclusion that no preference is due one way or the other. In *Ottumwa*, the 90% owners of one applicant for a radio station were deemed to control 100% of another radio station 100 miles away, while the 51% owners of a second applicant owned 100% of an AM/FM combination 200 miles away and 45% of a permittee for a station 400 miles away. The Board ruled that no diversification preference was due either applicant. However, we did so in

the context of rejecting the ALJ's undue emphasis on the number of stations, while not giving adequate consideration to the distance to those stations. That we considered distance a significant factor to be taken into account, not a determinative one, is clear from our reliance on *Cleveland Television Corporation*, 91 FCC 2d 1129, (Rev. Bd. 1982); *rev. denied*, FCC 83-235, released May 18, 1983; *affirmed sub nom. Cleveland Television Corp.* v. *FCC*, 732 F. 2d 962 (D.C. Cir. 1984). In Cleveland we found that an applicant for a UHF television station in Cleveland, Ohio, whose principals controlled a UHF television station in Detroit, about 100 miles away, was entitled to a slight diversification preference over an applicant whose principals controlled six radio stations, the closest of which was around 400 miles away. That conclusion was the result of a balancing of the various factors involved, including type of service, level of control, number of stations, and distance. The fact that principals of one applicant had an interest in a station only 100 miles away served to reduce any preference it might gain as a result of other factors; it was not, however, anything approaching determinative in its own right. Thus, as the foregoing indicates, the award of a preference for diversification is dependent on a number of possible relevant factors. The number of other stations and the distance to these stations are usually among these, but the significance of distance decreases when the other interests fall outside the proposed service area. *Policy Statement, supra*, 1 FCC 2d at 394-5.

15. The purpose of the Commission's giving preferences for diversification of control of the media of mass communications is to encourage the widest possible dissemination of information from diverse and antagonistic sources. *Id.* We have before us a situation where one applicant, Goetz, has control of at least seven stations and an interest in two more, all of which are at a substantial distance from the proposed community here. The other applicant, Wodlinger, has an interest in two stations equally distant, although its ownership percentage is higher. Wodlinger also has an attributable interest in the permittee for a station 100 miles from its proposed community. Wodlinger's two midwestern stations in effect cancel out two of Goetz's as far as distance, type of service, and significance are concerned.[8] What we are left with, then, is essentially a weighting of Wodlinger's wife's station 100 miles away, plus his greater attributable percentage ownership, against the five stations Goetz controls in the midwest, *plus* his interest in two other stations. Balancing these various factors, we conclude that, because of the significantly larger number of Goetz's interests, Wodlinger is entitled to a preference

[8] Neither applicant has shown that its opponent's holdings are more important in terms of audience size, regional or national coverage, or with respect to other media in their respective communities. *See id.*

under the diversification criterion, though only a slight one.[9]

16. *Integration.* Mr. Wodlinger proposes to work a minimum of 40 hours per week as station manager. He maintains residences in Naples, Florida; Mission Hills, Kansas; Ocala, Florida; and in Michigan. From 1977 through 1983, Wodlinger spent approximately seven or eight months a year at his residence in Naples. *I.D.*, para. 22; Tr. 24-25, 71. Wodlinger is a member of the Naples Power Squadron, the Collier County Conservancy, the Naples Civic Association, the Port Royal Property Owners Association, and the Naples Inflation Fighters. He is past member of the Naples Chamber of Commerce and the P.T.A.s at two schools.[10] *I.D.*, para. 26. He also has been and continues to be involved in a number of civic activities in Kansas City (Wodlinger Exh. 1, p. 3).

17. Mr. Goetz will work at least 40 hours per week as general manager of his proposed station. He has been a resident of Naples since 1972. *I.D.*, para. 38. While residing in Naples he has continued to be very active in the management of his broadcast stations in Wisconsin and spends approximately 85 days a year traveling on company business. Goetz Exh. 2. Goetz is a member of the Collier County Amateur Radio Club and the Naples FM Association, an amateur radio group which operates a repeater system in Collier County. He is a member of the Park Shore Property Owners Association and the Save the Bay Association. In 1974 he served a director and publicity chairman of the Naples Tennis Club. *I.D.*, para. 38. Both Wodlinger and Goetz have extensive and varied ownership and management experience in broadcasting. *I.D.*, paras. 24-5, 37.

18. The ALJ credited both Wodlinger and Goetz with 100% full-time integration of ownership and management. *I.D.*, para. 49. He found each of their proposals to be enhanced to about the same degree by virtue of their past broadcast experience, residence in the service area, and participation in civic activities there, and concluded that neither was to be preferred over the other under the integration criterion. *Id.* Goetz excepts to the ALJ's conclusion, claiming that he has been resident in Naples since

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[9] We note that in deleting its "regional concentration" rules, the Commission agreed with the Department of Justice that there was - in reality - no regional market for broadcast programming or business competition. *Multiple Ownership (Regional concentration of Control)*, 58 RR 2d 119, 123 (1985). It indicated "that diversity is further ensured by operation of the 'diversification criteria' under which in comparative hearings between two or more applicants for a broadcast station *preference is given to the applicant with the least amount of other media interests.*" *Id.*, at 124, n. 10 (emphasis added). Thus even if we considered Mrs. Wodlinger's Miramar station to be a "regional" interest (a dubious proposition, the Everglades considered), its weight here would not override Goetz's larger broadcast stable.

[10] From 1977 to 1983 Mr. Wodlinger's school age children attended schools in Kansas City for around one-third of the school year and attended schools in Naples for the remainder of the year. In 1983 they remained in Kansas City for the entire school year (Tr. 34-35).

before Wodlinger, and that, in addition, Wodlinger's residence has been only part time. Goetz also argues that he has demonstrated a high degree of personal familiarity with Golden Gate City, while Wodlinger has shown very little knowledge of Naples Park. Conversely, Wodlinger asserts that the record demonstrates that *he* has engaged in more numerous and more significant civic activities within the service area and that, accordingly, he should be given a slight preference over Goetz.

19. We will modify only very slightly the ALJ's conclusion that neither Wodlinger nor Goetz is to be preferred under the integration criterion. The record demonstrates that both Wodlinger and Goetz are individuals who are fortunate enough to live most of the time in an area of obvious attraction to vacationers and retirees, while actively maintaining substantial business operations elsewhere. They reside in Naples currently, but neither has any particularly long-standing business or professional ties to the Naples area. Although Goetz claims a knowledge of, and an interest in, the welfare of Golden Gate City, there is nothing in the record to substantiate the depth of that knowledge or interest, or to show that it much antedated the pendency of this proceeding.[11] Although the record indicates that both Wodlinger and Goetz reside a substantial part of the year in Naples, and have memberships in a few local organizations in the Naples area, they have virtually no substantial ties at all to the communities they have set forth as their communities of license. We conclude that the only difference worthy of any note is that Goetz has been an area "resident" for five years longer than Wodlinger. But, like Wodlinger, he has been absent from the area for a considerable portion of the ordinary year (para. 17, *supra*). Since they are substantially equal with regard to broadcast experience, and no other enhancement factors are present, Goetz may be entitled to only the most minimal edge under the integration criterion.

20. *Comparative Coverage.* The ALJ found that Wodlinger's proposed station would serve an area of 437 square miles with a population of 66,783, while Goetz's would serve 383 square miles with a population of 72,313. *I.D.*, para. 6. The area within their 1 mV/m contours already receive five or more primary aural services during the daytime. *Id.*, para. 7. At night, neither applicant will provide a new first, second, or third aural service to any area. Wodlinger will provide a fourth aural service to forty-one people in a 11.4 square mile area, and Goetz will provide such

[11] For instance, Goetz submitted a statement, dated February 23, 1984, (Goetz Exh. 1, p. 8) averring that for approximately the preceding two years he had subscribed to the Golden Gate City newspaper and for those two years he had clipped articles from it and the Naples newspaper containing information about Golden Gate City. The earliest of the articles that were submitted into evidence (Goetz Exh. 1, pp 9-48) appears to be one dated January 1, 1982, less than a month before the date stamp on Goetz's application (January 29, 1982) indicates it was received at the FCC (Notice is hereby taken of that date stamp.)

service to nineteen people in 7.5 square miles. As regards the provision of a fifth aural service, Wodlinger will serve thirty-six persons in 12.6 square miles, while Goetz will serve 1321 persons in 34.9 square miles. *Id.*, para. 8. The ALJ did not award either applicant a coverage preference. Goetz claims he is entitled to a slight preference, since the overall population he will serve is eight percent greater than that Wodlinger will serve, and because he will provide a fifth aural service to a total of 1,285 more persons than Wodlinger.

21. Slight preferences have been awarded simply for serving a larger total population, even when all persons in the coverage areas already receive at least five signals. However, in those instances the relative differences in the total populations served have generally been vastly greater than what is involved here. *See, e.g., Simon Geller*, 90 FCC 2d 250, 268-69, 276; (1982), *remanded on other grounds sub nom. Committee for Community Access* v. *FCC*, Case No. 82-2314 (D.C. Cir. June 15, 1984) (coverage of 360,000 people entitled to only a slight preference over coverage of 43,000 people); *Daytona Broadcasting, Inc.*, 97 FCC 2d 212, 231-32, (Rev. Bd. 1984), *affd*, FCC 85-318, released June 20, 1985 (serving 3.3 and 2.6 times respectively as many persons as his opponents entitles applicant to a slight preference). Although the Commission's primary concern is with providing underserved areas with the first or second day or nighttime service, preferences have been awarded for *substantial* differences in the provision of third, fourth, and even fifth services. *See Metro Broadcasting, Inc.*, 57 RR 2d 440, 449 (Rev. Bd. 1984); *Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 1112-13 (Rev. Bd. 1984); *Christian Broadcasting of the Midlands, Inc.*, 57 RR 2d 87, 91-92 (Rev. Bd. 1984). In the instant proceeding, Goetz provides total coverage to approximately eight percent more people than Wodlinger, and provides a fifth service to a relatively small number of people, though considerably more than Wodlinger. This is offset, however, by Wodlinger's providing a fourth service to more people than Goetz, though the additional number either will serve is miniscule, and any minute preference here would be non-decisional in this case.[12]

22. *Final Comparative Evaluation.* All exceptions having decisional significance have been considered by the Board. Wodlinger is entitled to a slight preference for diversification of control. At best, Goetz receives a minor preference for its coverage and, possibly, an equally slight "plus"

[12] Goetz excepts to the ALJ's refusal to find that he made the threshold showing insufficient to permit him to adduce evidence under the standard comparative issue about the prior broadcast record of several Goetz Broadcasting stations in Wisconsin. Having reviewed the ALJ's *Memorandum Opinion and Order*, FCC 84M-1271 (released March 16, 1984), which denied Goetz's request, and the various associated pleadings, we conclude that the ALJ's refusal was proper because Goetz failed to make a showing of an "usually good past broadcast record" with regard to any of the stations.

under integration. Wodlinger's preference for diversification, which is the primary objective under the *Policy Statement*, must prevail over any slight preferences awarded here to Goetz. *See, e.g., Communications Properties, Inc.*, 92 FCC 2d 45 (Rev. Bd. 1982), *rev. denied*, FCC 83-320, released July 7, 1983,

23. ACCORDINGLY, IT IS ORDERED, That the "Petition for Leave to Amend," filed by Mark L. Wodlinger on May 29, 1985, IS GRANTED, and the accompanying amendment IS ACCEPTED; and

24. IT IS FURTHER ORDERED, That the "Motion of Mark T. Wodlinger for Dismissal of Application of Williams County Broadcasting System, Inc." and the "Motion of Mark L. Wodlinger for Dismissal of Application of Juarez Communications Corporation," both filed on March 25, 1985, ARE GRANTED, and the applications of Williams County Broadcasting System, Inc. (File No. BPH-820129AM) and Juarez Communications Corp. (File No. BPH-820728AL) ARE DISMISSED; and

25. IT IS FURTHER ORDERED, That the "Request of Mark L. Wodlinger and Robyn E. Gerry for Approval of Partial Settlement," filed May 30, 1985, IS GRANTED; that the settlement agreement IS APPROVED; and the application of Robyn E. Gerry (File No. BPH-820128AL) IS DISMISSED; and

26. IT IS FURTHER ORDERED, That the "Request for Official Notice," filed by Nathan L. Goetz on May 29, 1985, IS DENIED; and

27. IT IS FURTHER ORDERED, That the "Motion to Supplement Record" filed by Nathan L. Goetz on May 14, 1985, IS GRANTED to the extent indicated above; and

28. IT IS FURTHER ORDERED; That the application of Mark L. Wodlinger (File No. BPH-810814AB) IS GRANTED, and that the application of Nathan L. Goetz (File No. BPH-820129AV) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

FCC 85D-4

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Mark L. Wodlinger Naples Park, Florida	MM Docket No. 83-1084 File No. BPH-810814AB
Robyn E. Gerry Naples, Florida	MM Docket No. 83-1085 File No. BPH-820128AL
Williams County Broadcasting System, Inc. Naples, Florida	MM Docket No. 83-1087 File No. BPH-820129AM
Nathan L. Goetz Golden Gate City, Florida	MM Docket No. 83-1089 File No. BPH-820129AV
Juarez Communications Corporation Naples Park, Florida	MM Docket No. 83-1091 File No. BPH-820728AL
For Construction Permit for a New FM Station	

Appearances

Michael R. Miller, Esq., on behalf of Mark L. Wodlinger; *James L. Oyster, Esq.*, on behalf of Robyn E. Gerry; *Thomas C. Henry, Esq.*, on behalf of Williams County Broadcasting System, Inc.; *Jerrold Miller, Esq.*, on behalf of Nathan L. Goetz; *John A. Borsari, Esq.*, on behalf of Juarez Communications Corporation; and *Norman Goldstein, Esq.*, on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: January 8, 1985; Released: January 15, 1985

I. Preliminary Statement

1. This is a comparative broadcast proceeding involving the mutually exclusive applications of Mark L. Wodlinger ("Wodlinger"), Robyn E. Gerry ("Gerry"), Raceway Broadcasting Corporation ("Raceway"), Williams County Broadcasting Systems, Inc. ("WCBS"), Gulfside Communications Corporation ("Gulfside"), Nathan L. Goetz ("Goetz"), John Brown University ("JBU"), and Juarez Communications Corporation ("Juarez") for a construction permit for a new FM station to operate on Channel 288A at Naples Park, Naples or Golden Gate City, Florida.[1]

2. The *Hearing Designation Order* specified the following issues for hearing:

1. To determine with respect to the following applicant(s) whether, in light of the evidence adduced concerning the deficiency set forth above in paragraph 8, the applicant(s) is financially qualified: Wodlinger, Gerry, WCBS, JBU.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant(s) would constitute a hazard to air navigation: Goetz, Gerry, WCBS.

3. To determine: (a) the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

4. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

3. By *Order* FCC 84M-1071, released March 5, 1984, the limited financial issue specified against Gerry was resolved in her favor. The air hazard issue specified against Goetz was also resolved in his favor. By *Order* FCC 84M-1072, released March 5, 1984, the air hazard and environmental issues specified against Gerry were resolved in her favor. By *Memorandum Opinion and Order* 84M-1178, released March 12, 1984, the limited financial issue specified against Wodlinger was resolved in his favor. Hearing sessions were held on the remaining issues at the Commission's offices in Washington, D.C. on March 19, 1984 through

[1] The applications of JBU, Raceway and Gulfside were dismissed with prejudice. *Order*, FCC 84M-2030, released April 30, 1984.

March 21, 1984. Proposed findings of fact and conclusions of law were submitted by the parties on June 4, 1984, and reply proposed findings on June 18, 1984.

II. Findings of Fact

A. WCBS Financial Issue

4. WCBS' amended Exhibit 4, "Plan of Financing and Balance Sheet", provides that WCBS intends to finance the proposed station by use of current assets and through the use of a bank loan in the event current assets are insufficient to meet the costs of construction and operation for three months. WCBS' estimated costs are $117,125. The balance sheet indicates current assets of $140,642. Of this amount, approximately $113,000 consists of accounts receivables. WCBS has not submitted a bank commitment letter in support of its contingent bank financing plan.

Air Hazard Issue

5. WCBS Ex. 5(a) indicates that a "no hazard" to air navigation determination was made by the Federal Aviation Administration respecting WCBS' proposed tower.

Section 307(b) Issue

Comparative Coverage

6. The areas and populations within the 1 mV/m (primary service) contour of each of the proposals are as follows (Joint Engineering Ex. 1, Fig. 6, pp. 13 thru 17):

Applicant	*Areas (Sq. Mi.)*	*Populations*
Wodlinger	437	66,783
Gerry	438	68,611
Williams County	191	58,984
Goetz	383	72,313
Juarez	437	66,783

7. During the daytime, the area within the 1 mV/m contour proposed to be served by each of the applicants receives five or more primary aural services (Joint Eng. Ex. 1, p. 10).

8. At night there are no areas where any applicant will provide either a first, second or third aural service. The following tabulation shows the areas and populations that would receive fourth and fifth nighttime service from each proposal (Figures 6 thru 6-D of Jt. Eng. Ex. 1; Supplemental Eng. Statement, Juarez Ex. A, pp. 2-3).

Applicant	*Fourth Service Area*		*Fifth Service Area*	
Wodlinger	11.4	41	12.6	36
Gerry			183.2	6,663
Williams County			34.5	1,639
Goetz	7.5	19	34.9	1,321
Juarez	11.4	41	12.6	36

City of Naples

9. Naples, an incorporated community, is the seat of Collier County. It had a 1980 population of 17,581. The city of Naples presently serves as the community of license for the following AM and FM broadcast stations: WRGI(FM), WSGC(FM), WCVU(FM) and WNOG(AM) (Gerry Ex. 4; Jt. Eng. Ex. pp. 3 & 11). Also licensed to Naples is WEVU(TV), a television station. Naples also has a cable system. The *Naples Daily News* is published six days per week, and the *Naples Star* is a weekly paper (Gerry Ex. 4).

Naples Park

10. Naples Park is approximately 7.5 miles north of Naples, Florida. The United States Census lists Naples Park as a "Census Designated Place," having a 1980 population of 5,438 (Wodlinger Ex. 3, Att. III). The 1970 population of Naples Park was 1,522 (Wodlinger Ex. 4, Att. III). Wodlinger's Exhibit 4, Att. II, states the "traditional" boundaries of Naples Park as follows: Bluebill Avenue/111th Street to the north, Vanderbilt Beach Road to the south, Route 41 to the east and Gulf Shore Road to the west. The Census Designated Place shown on the 1980 Census map for Naples Park is more generous in its description. In addition to all that is embraced by the "traditional" boundaries of Naples Park, the map includes an area adjacent to the Gulf Coast shoreline running north from the western end of Bluebill Avenue to an area known as Wiggins Pass (Wodlinger Ex. 5). Police protection is provided out of a county police sub-station located in Naples Park (Wodlinger Ex. 4). There are 15 full-time patrolmen on duty at this police sub-station (Tr. 83). Fire protection is provided by the North Naples Fire Control District which maintains a station in Naples Park. The sewer, water and public school systems in Naples Park are administered by Collier County. The Naples Park Elementary School is situated on the north side of Bluebill Avenue (Tr. 82). Sanitation service in Naples Park is provided by a commercial pick-up service. The First Baptist Church of Naples Park is located in Naples Park.

11. The Pavillion Shopping Mall is situated in the southern portion of Naples Park (Tr. 28, 144). There are six movie theaters and approximately

forty other commercial establishments presently located in the Pavillion Shopping Mall (Tr. 28, 142). Additionally, there are approximately fifty (50) other commercial establishments in Naples Park located along Route 41 from the intersection of Vanderbilt Beach Drive to 111th Street (Tr. 140). A number of small business offices are also located in Naples Park (Tr. 94). The central portion of Naples Park consists primarily of single family residences (Tr. 90).

12. No daily or weekly newspaper is published in Naples Park (Tr. 91, 174). Naples Park does not presently serve as the community of license or studio location of any existing AM, FM or TV station (Jt. Ex. 1).

Golden Gate City

13. Golden Gate City is located in Collier County and is about four square miles in area. It is an unincorporated community originally developed in the 1960s by the Gulf American Land Corporation, now known as Avatar Properties, Inc. (Goetz Ex. 1). It has a 1980 population of 4,327.

14. The Golden Gate Elementary School and the Golden Gate Middle School are situated in Golden Gate. These schools are administered by Collier County (Tr. 157). Golden Gate Elementary serves 877 pupils, and the Golden Gate Middle School has 816 pupils. A total of 640 students are enrolled in three private denominational schools within Golden Gate City.

15. Golden Gate City has 177 businesses and commercial service organizations (Goetz Ex. 1). There are approximately 26 civic clubs and organizations there. The two largest employers in Golden Gate City are the Sunshine Foodway, employing approximately 100 people, and the Golden Gate Country Club & Inn, which employes 40 people. The Sunshine Foodway opened during the middle of 1983 and is the first major supermarket to open in Golden Gate (Tr. 321).

16. Golden Gate has three doctors and two dentists. Two attorneys are in active practice there. There are seven churches located within Golden Gate City. Three financial institutions are located in Golden Gate.

17. The Golden Gate Community Center, containing 9,600 square feet of space, was constructed in 1977 with a 1,500 square foot addition made in 1983. The center employs a full-time director and has two additional full-time staff employees.

18. Police service is provided by the Collier County Sheriff's Department from a sub-station in Golden Gate City. The department has eight full-time staff employees and 32 volunteers.

19. Avatar Utilities, Inc., the developer of Golden Gate, provides sewer and water services, and refuse collection is provided by a private company (Goetz Ex. 1; Tr. 158).

20. Golden Gate has its own weekly newspaper, the *Golden Gate Eagle*, owned by the New York Times. American Cablevision Services, Inc., with offices located within Golden Gate City, serves 2,347 subscribers. There are no broadcast stations licensed to Golden Gate City.

III. Comparative Issue

Mark L. Wodlinger

21. Mark L. Wodlinger, an individual applicant, is chairman of the board, secretary, director and 50 percent shareholder of Wodlinger Broadcasting Company, licensee of KCLO-AM and KZZC-FM, Leavenworth, Kansas. Constance J. Wodlinger, Mr. Wodlinger's spouse, is president, treasurer, director and 50 percent shareholder of Wodlinger Broadcasting Company.

22. Mark Wodlinger proposes to devote a minimum of 40 hours per week to the management of the proposed Naples Park station as owner and station manager (Wodlinger Ex. 1). Mr. Wodlinger presently resides in Naples, Florida and in Mission Hills, Kansas. During the period from 1977 through 1983, Mr. Wodlinger spent approximately 7 to 8 months per year in Naples Park, Florida (Tr. 25).

23. Mr. Wodlinger received his preparatory school education at Bolles Military School in Jacksonville, Florida and, thereafter, attended the University of Florida where he received a B.S. degree in 1943. From 1943 to 1945, Mr. Wodlinger served as a lieutenant in the United States Navy. He received an honorable discharge in 1945.

24. Mr. Wodlinger began his broadcasting career in 1948 as a salesman for Station WQUA in Moline, Illinois, where he worked for one year. From 1949 to 1958, Mr. Wodlinger was employed as sales manager, and later station manager, of WOC-AM-FM-TV in Davenport, Iowa (Wodlinger Ex. 1). From 1959 to 1969, he was vice-president of WMBD-TV, Peoria, Illinois; from 1962 to 1963, he was vice-president, general manager WZZM-TV, Grand Rapids, Michigan; and from 1963 to 1969, Wodlinger was the vice-president and general manger of KMBC-TV, Kansas City, Missouri.

25. From 1969 to 1973, Mr. Wodlinger served as president of Intermedia, Inc. in Kansas City, Missouri. During this period, Intermedia, Inc. was the licensee of KBEA-AM, Mission, Kansas; KBEY-FM, Kansas City, Missouri; KQTV, St. Joseph, Missouri; KLYX-FM, Houston, Texas; and KGRV-FM, St. Louis, Missouri. Mr. Wodlinger had operating responsibility for each of the foregoing stations. During the period from 1971 to 1972, Mr. Wodlinger owned KILA-FM, Las Vegas, Nevada. During the period from 1972 to 1977, Mr. Wodlinger owned KBEQ-FM, Kansas City, Missouri.

26. Mr. Wodlinger is a former member of the Naples, Florida Chamber of Commerce (1978-82). He is presently a member of the Naples Power Squadron and the Collier County Conservancy. In the past, he served as a member of the board of directors of the Naples, Florida YMCA (1978-81). Mr. Wodlinger is a past member of the Lake Park Grammar School P.T.A. (1977-1983), and the Gulfview Middle School P.T.A. (1981-83). He is presently a member of the Naples Civic Association, the Port Royal Property Owners Association, and the Naples Inflation Fighters.

Robyn E. Gerry

27. Robyn E. Gerry, an individual applicant, will devote full-time to the position of general manager of the proposed station (Gerry Ex. 1). She will be responsible for the overall functioning of the station and will be responsible for all aspects of station operation. She will move to Naples, Florida upon grant of her application. Ms. Gerry has no ownership or other interest in any medium of mass communication (Gerry Ex. 2).

28. Ms. Gerry was born on October 19, 1957, in Liberty, New York. From January, 1975 to December 1981, she worked at Cablevision Industries, Inc., Liberty, New York (Gerry Ex. 3). The president of Cablevision Industries, Inc. is Ms. Gerry's father, Alan Gerry (Tr. 182). Ms. Gerry worked for approximately a year and one-half as a receptionist and was then promoted to advertising director and then director of marketing. From February, 1982 to July, 1983, Ms. Gerry was employed by Group W Satellite Communications in Stamford, Connecticut as a marketing representative (Gerry Ex. 3; Tr. 183). Since September, 1983, Ms. Gerry has worked as a consultant to Cablevision Industries, Inc. (Tr. 189). Ms. Gerry has had no past experience as an employee of a radio or television broadcast station (Tr. 187).

Williams County Broadcasting System, Inc.

29. Williams County Broadcasting System, Inc. is an Ohio corporation. It is the licensee of WQCT and WBNO-FM, Three Rivers, Michigan (WCBS Ex. 2).

30. Carl S. Shipley is the company's president, director and 38½ percent shareholder. He will supervise and be responsible for the operation of the proposed station, devoting as much time to that endeavor as may be required (WCBS Ex. 2). Williams County will hire a full-time station manager who will report to Mr. Shipley.

31. Mr. Shipley has been a resident of Naples for the past ten years. He served as an adjunct professor of communications law at American University from 1951 to 1962.

32. Williams County proposes the use of auxiliary power at the Naples station (WCBS Ex. 3).

Juarez Communications Corporation

33. Juarez holds no other mass media interest. Bernadette Wegerly, its 24.5 percent stockholder, secretary/treasurer and director, owns 100 percent of Wegerly Broadcasting Corporation, licensee of WFXZ(FM), Pinconning, Michigan (Juarez Ex. 3).

34. Robert N. Naismith, vice president and a director of Juarez, is the president and a director of Wegerly Broadcasting Corporation (Juarez Exs. 2 & 4). Jim K. Wegerly, vice president of marketing and a director of Juarez, is the treasurer and a director of Wegerly Broadcasting Corporation. Bernadette Wegerly and Jim K. Wegerly are husband and wife.

Nathan L. Goetz

35. Nathan L. Goetz is an individual applicant. Mr. Goetz is president, director and 50 percent shareholder of Goetz Broadcasting Corporation, licensee of WFAW and WSJY, Fort Atkinson, Wisconsin; WDLB/WLJY, Marshfield, Wisconsin; and WNBK, New London, Wisconsin. Goetz Broadcasting Corporation is also the holder of 50.1 percent of the stock of Sauk Broadcasting Company, licensee of WRDB and WRDB-FM, Reedsburg, Wisconsin. Mr. Goetz is a 50 percent partner in a three movie theatre operation in Monroe, Wisconsin.

36. Mr. Goetz proposes to work full-time, a minimum of 40 hours per week, at the proposed Golden Gate station as its General Manager (Goetz Ex. 2).

37. From 1958 to 1965, Mr. Goetz was the managing partner and one-third owner of KMAQ in Maquoketa, Iowa (Goetz Ex. 2). During 1959, he acted as managing partner of WFAW-FM in Fort Atkinson, Wisconsin. From July 1962 through most of 1963, he was involved in the construction and operation of WFAW, a directional AM station. In 1962 Mr. Goetz became a 50 percent owner of the two Fort Atkinson stations. In 1962 Mr. Goetz negotiated the purchase of WDLB-AM in Marshfield, Wisconsin and was the station's managing partner and 50 percent owner. In 1966 he directed the construction of WDLJ-FM, and also was responsible for program selection and format.

38. Mr. Goetz has been a full-time resident of Naples, Florida since 1972. He is a member of the Collier County Amateur Radio Club, located in Naples, Florida, and the Naples FM Association, which operates a VHF radio repeater system in Collier County. Mr. Goetz is a member of the Park Shore Property Owners Association, and in 1974 he served as publicity chairman and as a director of the Naples Tennis Club. Mr. Goetz is currently a member of the Save the Bay Association (Tr. 220).

IV. Conclusions of Law

Williams County Financial Issue

39. Williams County has not demonstrated that it has sufficient liquid current assets or reasonable assurance of bank financing to support its proposal. Williams County has failed to establish its financial qualifications in this proceeding.

Section 307(b) Issue

40. During the daytime, the applicants proposed service areas are well served. At nighttime, Wodlinger, Goetz and Juarez would provide a fourth service to populations of 41, 19 and 41 persons in 11.4, 7.5 and 11.4 square miles areas, respectively. However, any preference for their provision of a fourth service would be offset by Gerry's fifth service to a larger population of 6,663 in a 183.2 square mile area. Williams County would also provide a fifth service to a slightly larger population than the applicants providing a fourth to a small area. The differences between the applicants are *de minimus*. Accordingly, no preference results to any applicant from the coverage aspects of its proposal.

41. As stated in *FM Broadcast Rules*, 40 FCC 662, 664 (1962), the Section 307(b) objectives are:

1. provision of some service to all of the nation, or as much as possible (service to white areas);
2. provision of as many program choices to as many listeners as possible (service to gray areas); and
3. service of local origin to as many communities as possible.

These criteria were recently reaffirmed in *FM Assignment Policies and Procedures*, 90 FCC 2d 88, 51 RR 2d 807 (1982), where first aural service was given first priority and second aural service and first local transmission received second priority, with all remaining areas of comparison receiving third priority.

42. None of the proposals in this case would bring service to a "white" or "gray" area; and, because all applicants seek to serve substantially the same areas, none of them warrants a preference based on the reception characteristics. However, considering the priority to be given to the provision of service of local origin, it is clear that the proposals for Golden Gate City and Naples Park are to be preferred over the proposals for Naples. The objectives of Section 307(b) would best be achieved by a grant of either the Wodlinger, Goetz, or Juarez application. While Naples is a larger community than either Golden Gate or Naples Park, it already has four local aural stations; Golden Gate and Naples Park have none.

43. Where the choice is between two communities seeking a first local transmission service, the Commission presumes that the most populous

community has the greatest need for the first service, provided that it has commensurately greater civic, cultural, religious, social, and commercial attributes. *Affinity Communications, Inc.*, 56 RR 2d 510 (Rev. Bd. 1984).

44. With respect to the Wodlinger and Juarez proposals, there is no sufficient basis for considering the areas north of Bluebill Avenue and the area as far west as the Gulf as part of Naples Park. The area west of Gulf Shore Road is known as "Vanderbilt Beach" and is not generally considered to be a part of Naples Park. The Rand-Nally Community Atlas and Marketing Guide lists Vanderbilt Beach and Naples Park separately, indicating that each is a separate entity (Wodlinger Ex. 3, Att. I). Advertisements for the sale of real estate in the Naples Park newspaper and in the Naples Area Board of Realtors Multiple Listing Book show separate listings for Vanderbilt Beach and Naples Park (Goetz Ex. 1, p. 49). Highway signs in the area depict the directions to "Vanderbilt Beach" (Tr. 89). Wodlinger conceded that Vanderbilt Beach was either part of North Naples (Tr. 77) or was a separate community, as was indicated by a circle on a certain map (Tr. 78). Mr. Mark L. Wodlinger testified that on the basis of his knowledge of the community, information obtained from realtors, and everything else, Bluebill Avenue is the northern boundary of Naples Park, and Gulf Shore Road is the western boundary (Tr. 24-26). The southern boundary is Vanderbilt Beach Road, and the eastern one is Route 41 (Tr. 98). It is concluded that the Census Designated Place of Naples Park is larger than the generally recognized boundaries of Naples Park.

45. As indicated, the 1980 U.S. Census lists the 1980 census of the larger area, the Census Designated Place, as having been 5,438. Excluding the population of Vanderbilt Beach and that in the area north of Bluebill Avenue from the census figure of 5,438, it is concluded that the population of Naples Park is something less than that shown in the 1980 census count shown herein.

46. The 1980 Census population of Golden Gate City was 4,327;[2] for purposes of this record, the population of Naples Park is some unknown

[2] Nathan Goetz testified that the 1983 population of Golden Gate is estimated to be 7,249, a 68 percent increase since 1980. When questioned about this, Goetz first testified that the information was based on a statement (which was not received in evidence) of a Collier County Planner, Barbara Cacchione (Tr. 204). He then testified that the 7,249 population figure was derived jointly by him and Ms. Cacchione (Tr. 207-8). Goetz claims that he personally participated in the making of Cacchione's population estimate and that he understood very well just how Cacchione arrived at her estimate. What is not understood is just what Goetz's "personal participation" is believed to have brought to the process of deriving Cacchione's population estimate. For all that appears, Goetz's testimony concerning the population estimate is an unconvincing attempt to salvage the rejected Cacchione estimate. The record provides no basis for placing confidence in Goetz's assertion that the 1983 population of Golden Gate City is 7,249.

figure less than 5,438. In the circumstances, neither Golden Gate nor Naples Park can be considered "the most populous community" for Section 307(b) purposes.

47. Nothing else about either of these places indicates that one, rather than the other, has a greater need for the station at issue. The two places are quite similar in terms of their political, cultural, religious, social, and commercial attributes. The choice among the three applicants for the two communities must be made under the standard comparative issue.

Comparative Issue

48. Goetz has interests in seven radio stations in Wisconsin. Wodlinger owns two radio stations in Kansas. A Juarez principal is the 100 percent owner of a radio station in Michigan. All of these interests are in locations far from Naples Park and Golden Gate City; consequently, their significance for diversification purposes is diminished. Even so, Juarez, with a principal having only one media interest chargeable to her, is preferred on diversification grounds over both Goetz and Wodlinger. The preference is very slight. Wodlinger's interest in two radio stations garners him a slight diversification advantage over Goetz, who has interests in seven stations.

49. No Juarez principal is to be integrated in the operation of the facility. Both Wodlinger and Goetz propose 100 percent full-time integration of ownership and management. Each of the latter two proposals is enhanced to about the same degree by virtue of the principals past broadcast experience, residence in the service area, and participation in civic activities there. Thus, Wodlinger and Goetz are deemed equal on the integration criterion, although both are superior to Juarez in this regard.

50. In summary, Juarez is slightly better than Goetz on diversification grounds, and is very slightly superior to Wodlinger. Wodlinger is slightly better than Goetz on diversification, and is substantially better than Juarez under the integration criterion. That substantial integration preference overcomes Juarez's very slight diversification advantage and entitles Wodlinger to a grant.

Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion,[3] the application of Mark L. Wodlinger IS GRANTED and the applications of Robyn E. Gerry, Williams County Broadcasting System,

[3] In the event exceptions are not filed within thirty (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its public release pursuant to Section 1.276(d).

Inc., Nathan L. Goetz, and Juarez Communications Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

EDWARD LUTON, *Administrative Law Judge*

Comparative Criteria
Ownership and Management, Integration of

Applicant may not increase ownership after "B" cut-off date in order to enhance integration credit; even if it could, it would lose on unchallenged diversification preference.
—*Mountain Media, Inc.*
MM Docket No. 84-555

FCC 85R-66

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Mountain Media, Inc. Bradford, Pennsylvania	MM Docket No. 84-555 File No. BPH-830222AG
Donald J. Fredeen Bradford, Pennsylvania	MM Docket No. 84-556 File No. BPH-830707AE
Bradcomm, Inc. Bradford, Pennsylvania	MM Docket No. 84-557 File No. BPH-830714BB
For Construction Permit for a New FM Station	

Appearances

Eugene T. Smith, on behalf of Mountain Media, Inc.; and *James A. Koerner*, on behalf of Donald J. Fredeen.

DECISION

Adopted: August 6, 1985; Released: August 12, 1985

BY THE REVIEW BOARD: JACOBS AND BLUMENTHAL. BOARD CHAIRMAN MARINO ABSENT.

BOARD MEMBER BLUMENTHAL:

1. This proceeding involves the mutually exclusive applications of Mountain Media, Inc. (MMI) and Donald J. Fredeen for authority to construct a new FM broadcast station in Bradford, Pennsylvania. The only issue for resolution is the standard comparative issue. In an *Initial Decision*, FCC 85D-15, released March 11, 1985 ("*I.D.*"), Administrative Law Judge Joseph Stirmer (ALJ) found Fredeen to be the obvious comparative winner because it received a slight to moderate preference for diversification of control as well as a preference for integration of ownership and management; accordingly, the ALJ granted Fredeen's application and denied MMI's application.[1] MMI excepts to this result. We have reviewed the *I.D.* in light of the exceptions and reply brief and our examination of the record. We adopt the ALJ's findings of fact and conclusions of law and affirm his ultimate conclusion that Fredeen is the superior applicant.[2]

2. The only exception raised by MMI in its three page brief is that the ALJ erroneously granted it only 60% quantitative integration credit, although it amended its application on July 13, 1984 to increase the ownership interests of its integrated principals Petrina B. Aubol and Dean F. Aubol to 45% each, for a total of 90% ownership integration. MMI appears to argue that given this 90% credit together with its qualitative enhancements, its proposal is superior to the 100% integration credit awarded Fredeen and mandates that MMI is the favored applicant. We flatly disagree.

3. Few principles are more firmly fixed in our case law than that which holds that an applicant may not seek to improve or upgrade its comparative posture after the "B" cut-off date for amendments as of right. *See Alexander S. Klein*, 86 FCC 2d 423, 434 (1981), and cases cited therein; *Northland Communications*, FCC 85R-30, released April 8, 1985, para. 6. Here, the "B" cut-off date was November 9, 1983 and MMI's amendment increasing the Aubols' ownership shares was not submitted until a full eight months later. Its attempted upgrade was even one month after the *Hearing Designation Order*, MM 4539, released June 12, 1984. In these circumstances, the ALJ correctly ruled (at TR. 35-38) that MMI's integration credit would be limited to its 60% ownership proposal as of the "B" cut-off date, which is legally far inferior to Fredeen's 100% integration proposal. Even, however, were we to agree with MMI's

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[1] A third applicant, Bradcomm, Inc., was also denied by the *I.D.* and has filed no exceptions. Its application will therefore be dismissed for failure to prosecute. Section 1.276(f) of the Rules, 47 C.F.R. 1.276(f).

[2] In view of the result reached here, we shall dismiss as moot Fredeen's motion to strike MMI's exceptions.

integration argument, we would deny its exceptions because they are simply non-decisional. That is, MMI nowhere disputes the "primary" comparative preference awarded by the ALJ to Fredeen for diversification of control. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965). Thus, Fredeen's unchallenged diversification preference, whether or not its integration advantage is diminished,[3] would assure its victory in this proceeding. *See Big Bend Broadcasters*, 96 FCC 2d 166, 173 (Rev. Bd. 1983). A grant of its application will best serve the public interest.[4]

4. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed May 31, 1985 by Mountain Media, Inc. IS GRANTED and the amendment IS ACCEPTED; that the motion to strike filed April 16, 1985 by Donald J. Fredeen IS DISMISSED; that the application of Donald J. Fredeen (File No. BPH-830707AE) for a construction permit for a new FM station at Bradford, Pennsylvania IS GRANTED; that the application of Mountain Media, Inc. (File No. BPH-830222AG) IS DENIED; and that the application of Bradcomm, Inc. (File No. BPH-830714BB) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

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[3] Raising MMI's integration credit to 90% probably would not be sufficient to overcome Fredeen's quantitative advantage, *see Metro Broadcasting, Inc.*, 57 RR 2d 440, 451 (Rev. Bd. 1984), and furthermore, the record does not support MMI's claim that it is qualitatively better enhanced than Fredeen. *See I.D.*, paras. 8, 9, 11, 14.

[4] In light of the nature of MMI's exceptions in this case, we can see no reason, *at the moment*, for their filing other than delay. In this regard, we call counsel's attention to Section 1.52 of the Commission's Rules, 47 C.F.R. 1.52, which states in pertinent part that: "The signature . . . by an attorney [to any pleading filed with the Commission] constitutes a certificate by him that he has read the document; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay . . . . An attorney may be subjected to appropriate disciplinary action, pursuant to, §1.24, for a willful violation of this rule . . . ." We trust that counsel here had *some* reason for filing exceptions patently non-decisional, and expect in similar future circumstances that we will be advised of those reasons, lest we draw inferences seriously adverse.

FCC 85D-15

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Mountain Media, Inc. Bradford, Pennsylvania	MM Docket No. 84-555 File No. BPH-830222AG
Donald J. Fredeen Bradford, Pennsylvania	MM Docket No. 84-556 File No. BPH-830707AE
Bradcomm, Inc. Bradford, Pennsylvania	MM Docket No. 84-557 File No. BPH-830714BB
For Construction Permit for a New FM Station	

Appearances

Eugene T. Smith on behalf of Mountain Media, Inc.; *James A. Koerner* on behalf of Donald J. Fredeen; *Frederick A. Polner* on behalf of Bradcomm, Inc.; and *Norman Goldstein* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

Issued: March 5, 1985; Released: March 11, 1985

Preliminary Statement

1. This proceeding involves the applications of Mountain Media, Inc. (MMI), Donald J. Fredeen (Fredeen) and Bradcomm, Inc. (Bradcomm) for a construction permit to operate on the frequency 98.3 mHz (Channel 252A) at Bradford, Pennsylvania. By *Hearing Designation Order* (MM 4539) released June 12, 1984, these applications were designated for hearing on the following issues:

> To determine which of the proposals would, on a comparative basis, best serve the public interest.

To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

The *Hearing Designation Order* also specified that the areas and populations to be served by each of the proposals, together with the availability of other primary aural service to such areas and populations, should be considered under the standard comparative issue.

2. A prehearing conference was held on August 9, 1984. Hearing on the specified issues was held on November 6, 1984, on which date the record was closed, except for the limited purpose of receiving into evidence a supplement to the joint engineering exhibit. The supplement was filed on November 19, 1984.

3. Proposed findings of fact and conclusions were filed by MMI. Fredeen, Bradcomm and the Mass Media Bureau on January 28, 1985. Reply findings were filed by Fredeen on February 8, 1985.

Findings of Fact

Mountain Media, Inc.

The Applicant

4. Mountain Media, Inc. is a Pennsylvania corporation with the following officers, directors and shareholders:

Petrina B. Aubol	*Dean F. Aubol*	*Charles L. Colby*
President	Secretary	Vice-President
Director	Director	
45% shareholder	45% shareholder	10% shareholder

However, prior to the "B" cut-off date, Petrina B. Aubol was only a thirty (30%) percent shareholder and Dean F. Aubol also was only a thirty (30%) percent shareholder. (MMI Ex. 1, Tr. pp. 35-38). Mike McGoff who is no longer a stockholder, also owned a thirty (30%) percent stock interest as of the "B" cut-off date.

Diversification

5. Petrina Aubol, Dean Aubol and Charles Colby own, respectively, 89%, 10%, and 1% of Catoctin Broadcasting Corporation (Catoctin), licensee of WTHU-AM, Thurmont, Maryland. (MMI Ex. 3). Station WTHU, which operates with power of 500 watts daytime and 100 watts at night, is located approximately 200 miles from Bradford. (Tr. 49-50, 58). Catoctin also publishes a monthly tabloid, "The Blue Ridge News" containing articles of interest in the station's listening area, averaging 20 pages with a circulation of 10,000. (MMI Ex. 3; Tr. 47-49). Petrina and Dean Aubol also jointly own 50% of A.P.A. Communications, Inc., licensee of WATN-AM, Watertown, New York and permittee of WTOJ-FM,

Carthage, New York. (MMI Ex. 3). Watertown and Carthage are about 375 miles from Thurmont. (Tr. 58). The Aubol's are each one-third partners in an application for a new FM station at Whitneyville, Pennsylvania. (MMI Ex. 3).

Integration

6. Petrina Aubol, who is the spouse of Mr. Aubol, is proposed as General Manager of MMI's station, responsible for oversight of all aspects of the day-to-day operation, short-term and long-term planning, hiring and termination of personnel, and oversight of programming decisions and development of program planning. She plans to devote at least 40 hours per week to these duties. (MMI Ex. 1). Mr. Aubol proposes to be Business/Sales Manager of the Bradford station. In that capacity, he will be responsible for oversight of the Sales Department, developing and implementing accounting and record keeping systems and financial affairs. He will devote at least 40 hours per week to these duties, and will report to Mrs. Aubol, the station's proposed General Manager. (MMI Ex. 1). Mr. Colby, who is Mrs. Aubol's son, does not intend to be integrated into the operation of the station, but will spend one weekend a month in Bradford.

7. Mrs. Aubol was born in Flushing, New York, and attended New York City public schools. She graduated in 1955 from Syracuse University with a degree in Journalism and English. In 1971, she began working as Manager at family-owned WTHU, a position she still holds.

8. Mr. Aubol was born in Manitowac, Wisconsin. After high school, he served in the Army from 1951 to 1954. In 1956, he opened a shoe store in Frederick, Maryland and operated it as a sole proprietor until 1961. He then became a Manager for J.C. Penney in Frederick, a position he held for 10 years. Mr. Aubol's first radio experience was in 1960 as part-time disc jockey and salesman for WFMD-FM. Since 1972, he has been Sales and Business Manager for WTHU. He is also an affiliate representative in the Northeast and Middle Atlantic region for Transtar Radio Network, a position which involves signing and soliciting radio stations for the Transtar programming. He is paid on a commission basis by Transtar, and presently devotes about 40 hours per week on its business from his office at WTHU. He may continue this business from his office in Bradford if MMI is the successful applicant. (MMI Ex. 2; Tr. 67, 70, 71).

9. If successful in this proceeding, Mr. and Mrs. Aubol propose to leave their positions at WTHU, and to move to Bradford, Pennsylvania. (MMI Ex. 2)

Auxiliary Power

10. MMI proposes to install an auxiliary power generator. (MMI Ex. 4).

Donald J. Fredeen

The Applicant

11. Donald J. Fredeen is an individual applicant. (TR. 75). He resides in Derrick City, Pennsylvania, approximately five miles from the center of Bradford. He has lived in the Bradford area since 1980. (Fredeen Ex. 1).

Diversification

12. Mr. Fredeen has no interest in any broadcast station or cable system. He does own less than 3% interest in Seneca Media, Inc., a publisher of newspapers in New York state. The cities of publication, and distances from Bradford are as follows:

City of Publication	*Frequency of Publication*	*Distance from Bradford*
Hornell	Daily	90-100 mi.
Wellsville	Daily	50
Dansville	Weekly	90
Bath	Weekly	110
Penn Yan	Weekly	130

None of these newspapers have circulation in the Bradford area. (Fredeen Ex. 1; Tr. 107-109). Mr. Fredeen's two sons (aged 7 and 5) each have less than 3% interest in Seneca Media, Inc., but the stock is voted by their maternal grandfather, T.R. Bromeley. (Tr. 86-87).

Integration

13. Mr. Fredeen will be General Manager of the proposed station. At present, he is employed as Sales Manager of Top Line Corporation, a distributor of dairy equipment. (Fredeen Ex. 1; Tr. 78). If successful, he intends to terminate that employment, and become General Manager of the station, devoting a minimum of 40 hours per week to overseeing all aspects of the station's operation, including sales, programming, technical and personnel. (Fredeen Ex. 1).

14. Mr. Fredeen has prior broadcast experience. He was Program Director of WKPS-FM, Westminster College, Pennsylvania from 1970 to 1974; Account Executive at WKSN/WHUG, Jamestown, New York from 1974 to 1975; Commercial Manager at WLSV, Wellsville, New York from 1975 to 1979. Since 1979 he has been an occasional sportscaster on WLSV. (Fredeen Ex. 1; Tr. 104).

Auxiliary Power

15. Fredeen proposes to have auxiliary power generating equipment to continue operations in the event of a power outage. (Fredeen Ex. 1).

Bradcomm, Inc.

The Applicant

16. Bradcomm, Inc. is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. Bradcomm has the following officers, directors and shareholders:

George Sciranko	*William S. Hearst*
President and Treasurer	Vice President and Secretary
Director	Director
50% shareholder	50% shareholder

Diversification

17. Bradcomm has no ownership or other interest in any media of mass communications. Although Mr. Sciranko is the Sales Manager of WWCH, Clarion, Pennsylvania he has no ownership interest in that station or any other media of mass communications. Mr. Hearst owns sixty-seven (67%) percent of the stock of Clarion County Broadcasting Corp. Clarion County Broadcasting Corp. is the licensee of WWCH, Clarion, Pennsylvania and is the holder of a construction permit to construct a new FM station at Clarion, Pennsylvania. Mr. Hearst holds no other mass media interests cognizable in this proceeding under the diversification criterion of the standard comparative issue. (Bradcomm Exs. 2 and 3).

Integration

18. At such time as the Bradcomm application is granted, Mr. Sciranko will move to Bradford and will spend full time (in excess of forty (40) hours per week in the construction and operation of the station. In addition to his duties as President and Treasurer of the corporation, Mr. Sciranko will become General Manager of the proposed station. His management responsibilities will encompass all phases of the station's operation and he will make all day-to-day management decisions affecting the station's activities and operations. (Bradcomm Ex. 2). Mr. Hearst will spend in excess of twenty (20) hours per week in the construction and operation of the proposed FM station. His responsibility will specifically include serving as the station's Business Manager. He will fully participate in the formulation of station policy and its implementation. In addition, he will consult with Mr. Sciranko on a daily basis and assist him in overseeing the operation of the station. (Bradcomm Ex. 3).

19. George Sciranko was born in Manns Choice, Pennsylvania in 1939. He currently resides in Marble, Pennsylvania. Mr. Sciranko is the father of four children, ages 23, 21, 19 and 16. He attended Bedford (Pennsylva-

nia) High School, graduating in 1959. Thereafter, Mr. Sciranko attended Johnstown (Pennsylvania) Vocational Technical School, receiving a degree in sales in 1968. (Bradcomm Ex. 2).

20. Mr. Sciranko started in radio broadcasting in 1963 when he worked at WWDS in Everett, Pennsylvania. His primary duties were in sales and "on-air". In 1965, Mr. Sciranko moved to Hagerstown, Maryland, where he worked in the sales department and as an announcer at WJEJ/AM and FM until 1966. From 1966 to 1972, Mr. Sciranko served as Assistant General Manager of WCRO, Johnstown, Pennsylvania. At WCRO, Mr. Sciranko supervised a staff of seventeen persons. During a fourteen month period while at WCRO, Mr. Sciranko served as Acting General Manager. Upon leaving WCRO, he was employed at WJNL/AM and FM, Johnstown, Pennsylvania, as Sales Manager from 1972 until 1975. As Sales Manager, Mr. Sciranko had the responsibility for supervision of both sales and station personnel totalling ten people. In 1975, Mr. Sciranko moved to Bedford, Pennsylvania to assume his post as Program Director at WBFD-AM and WAKM-FM, where he remained until 1980. There, Mr. Sciranko managed a staff of seven persons. In 1980, Mr. Sciranko moved to Monroeville, Pennsylvania, where he was engaged as Vice President in the operation of WRUA. In 1981, Mr. Sciranko had been at WWCH-AM in Clarion, Pennsylvania, where he now holds the position of Sales Manager. (Bradcomm Ex. 2).

21. Beginning in the summer of his junior year at college, Mr. Hearst worked in the news department of WWCH-AM, Clarion, Pennsylvania and assisted in the bookkeeping department. Upon graduation from college, Mr. Hearst returned to Clarion to seek full time employment at WWCH. Mr. Hearst began his full time employment by rotating through various departments of the radio station. In the spring of 1979, Mr. Hearst was appointed the General Manager of WWCH and has remained in that position to the present time. Mr. Hearst manages a staff of seven full time and seven part-time employees and has complete responsibility for the day-to-day operation of the radio station.

Auxiliary Power

22. Bradcomm will construct and install standby electrical generators and associated equipment to supply electric power to the station in the event of a failure of regular power sources. One generator will be installed at the studio site.

Comparative Coverage

23. The areas and populations within the 1 mV/m contour proposed by each applicant are as follows:[1]

Applicant	*Area (sq. mi.)*	*Population*
Donald J. Fredeen	635.9	49,176
Bradcomm, Inc.	567	53,770
Mountain Media, Inc.	640	55,335

24. There are five or more daytime aural services provided to the areas to be served by each of the applicants. At night the contours of all applicants are so closely matched so that no comparative advantage accrues to any applicant.

Ultimate Findings and Conclusions

25. This proceeding involves the mutually exclusive applications of MMI, Fredeen, and Bradcomm for a construction permit for a new FM station in Bradford, Pennsylvania. The only issue to be resolved is the comparative issue, which includes consideration of the coverage characteristics of the three proposals.

26. Evaluation of comparative applications is governed by the Commission's *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (hereinafter *Policy Statement*). In the *Policy Statement*, the Commission established the two primary objectives toward which the process of comparison should be directed: (1) the best practicable service to the public; and (2) a maximum diffusion of control of the media of mass communications.

27. The *Policy Statement* describes diversification of control of the media of mass communications as, "a factor of primary significance". *Id.* at 394. In evaluating the significance of media interests under diversification, media holdings in the proposed community of license will normally be of most importance, followed by other interests in the remainder of the service area, and finally, by interests in the nation generally. *Policy Statement* at 395. Other important factors to weigh are the degree of the applicants' ownership and control in these media, and their significance in terms of size and coverage, and in relationship to other media in their respective areas. Control of large interests elsewhere in the state or region may outweigh control of a small medium of expression (such as a weekly newspaper) in the same community. The media interests of the applicants must be evaluated with the above principles in mind.

[1] All figures are based on the Joint Engineering Exhibit filed on October 22, 1984 and supplemented on October 24, 1984 and November 19, 1984.

28. The principals in MMI collectively own a full time AM station in Thurmont, Maryland, a community 200 miles from Bradford, Pennsylvania. Stockholders with a 90% ownership interest in MMI also own a full time station in Watertown, New York, and a construction permit for a new FM station at Carthage, New York. Watertown and Carthage are about 375 miles from Thurmont. In addition, MMI principals publish a monthly tabloid in Thurmont with a circulation of 10,000. George Sciranko, a ½ owner of Bradcomm owns no interest in any media of mass communications, but the other ½ owner of Bradcomm has a 67% interest in a daytime AM station and a construction permit for a new FM station at Clarion, Pennsylvania. Clarion is located approximately 70 miles from Bradford. Fredeen owns less than 3% of Seneca Media, Inc. This company publishes two daily and three weekly newspapers. The daily newspapers are in communities 50 and 90-100 miles from Bradford. The communities in which the weekly papers are published are located from 90 to 130 miles from Bradford. Even if the interests of Fredeen's children in Seneca Media, Inc. were considered, the total interest would be under 9%.

29. On the basis of the foregoing facts, it is clear that Fredeen is entitled to a preference under diversification. His interest in the company that publishes two daily and three weekly newspapers is slight and, from a comparative standpoint, less significant than the media interests attributed to the principals of MMI and Bradcomm. Thus, Fredeen enjoys a slight to moderate preference over both MMI and Bradcomm on the factor of diversification.

30. Fredeen also enjoys a preference over MMI and Bradcomm under the best practicable service criteria, which involves consideration of the applicants' integration proposals. Fredeen alone proposes 100% full time integration as General Manager. This is enhanced by his local residence, and some broadcast experience. MMI proposes 60% full time participation. This is enhanced by the female status of one of the two integrated principals, the proposal that the principals will move to the community, and past broadcast experience. Bradcomm proposes 50% full time and, 50% part-time participation, enhanced by the commitment of the full time participant to relocate to Bradford, and past broadcast experience. The clear quantitative difference in integration favoring Fredeen makes it unnecessary to examine qualitative factors in any great detail. *New Continental Broadcasting Co.*, 88 FCC 2d 830 (1981).

31. From a comparative engineering perspective, there is no decisionally significant difference in the areas and populations to be served and there is no decisionally significant difference in the comparative coverage of the applicants. Thus, no preference for superior coverage is warranted. Also, because all three applicants have proposed auxiliary power, no comparative preference accrues to any applicant.

32. MMI argues that it should be the preferred applicant because of its female ownership. However, the mere fact that a 30% MMI integrated stockholder is a woman does not carry the day for MMI. MMI only has 60% integration credit. This is sufficiently less than the 100% proposed by Fredeen to render qualitative factors, such as female ownership, decisionally insignificant. *New Continental Broadcasting Co.*, cited *supra.* Also, MMI stockholders have significant other media interests.

33. Bradcomm argues that it should be the preferred applicant. In support of this position, Bradcomm argues that Mrs. Aubol of MMI and Fredeen both lack credibility and their respective demeanor was such that their proposals should not be credited. These arguments are rejected as lacking in factual support. The testimony of Mrs. Aubol and Mrs. Fredeen does not warrant the harsh condemnation urged by Bradcomm. While Mr. Fredeen is accused of "inconsistencies and falsehoods" and not being "totally candid", nothing presented by Bradcomm rises to the level that would warrant disqualification or the imposition of a comparative demerit against either applicant.

34. In summary, Fredeen enjoys preferences under both diversification and the best practicable service (integration) criteria, the two primary objectives toward which the comparative process is directed. Thus, a grant of his application will best serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[2] the application of Donald J. Fredeen for a construction permit for a new FM station to operate on the frequency 98.3 mHz (Channel 252A) at Bradford, Pennsylvania IS GRANTED and the competing applications of Mountain Media, Inc. and Bradcomm, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH STIRMER, *Administrative Law Judge*

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Domestic Public Land Mobile Service, See Also Mobile Mobile Radio Service

Commission effected further modifications to the Part 22 rules granting in part petitions for reconsideration filed against the *Report and Order*revising Part 22, FCC 2d 769 (1983)
—*Public Mobile Radio Service*
CC Docket No. 80-57

FCC 85-367

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Revision and Update of Part 22 of the Public Mobile Radio Service Rules	CC Docket No. 80-57

ORDER ON RECONSIDERATION

Adopted: July 11, 1985; Released: July 31, 1985

BY THE COMMISSION: COMMISSIONER RIVERA NOT PARTICIPATING.

Background

1. On December 19, 1983, the Commission released a *Report and Order* revising the Public Mobile Radio Service Rules, Part 22, 95 FCC 2d 769 (1983). This order resolves Petitions for Reconsideration and other pleadings seeking clarification of the *Report and Order.*

2. The Commission released a Notice of Proposed Rulemaking proposing to revise Part 22 of the rules on September 8, 1982, 47 Fed. Reg. 43842 (October 4, 1982). Comments had previously been requested in a Notice of Inquiry, 45 Fed. Reg. 14074 (March 4, 1980). Rule revisions were adopted in a subsequent *Report and Order, supra,* rewriting the rules in plain language, bringing their text up to date with existing technology, and adding or revising definitions to explain more fully the meaning of certain rules. In addition, revisions were made to eliminate or reduce government regulation where possible, in favor of self-regulation and a competitive marketplace. In keeping with these objectives we also eliminated many of the forms applicants are required to file, and simplified the ones retained. After carefully reviewing the petitions for reconsideration and other pleadings filed in this proceeding and based upon our own experience, we

have determined that some areas require further clarification. In keeping with the format used in the previous order we will address each rule commented upon in a numerical sequence.

Discussion

3. *Definitions, Section 22.2.* We modified, updated and deleted definitions which were obsolete or ambiguous. The only party commenting on this rule section, Jubon Engineering Inc. (Jubon) recommends that the definition of "central office" be changed to conform to present day use of the term which denotes a location with a much broader spectrum of circuit terminations than just landline. This phrase is in fact utilized in services other than in the Public Mobile Services and is not necessary in Part 22 at all. Accordingly, we will eliminate the term "central office" from Section 22.2.[1] In addition, we have revised the definition for Cellular Geographic Service Area (CGSA) editorially to render it consistent with Section 22.903(a).

4. *Notification of Status of Facilities (FCC Form 489), Section 22.9 (b).* This rule provides that upon completing construction the licensee shall notify the Commission using FCC Form 489. This new form was adopted in light of our elimination of the two-step application process, that had required both a construction permit and license to cover. *See* 95 FCC 2d at 773-774. After numerous inquiries from the public we are persuaded that this rule needs further clarification. The rule does not state clearly the time when applicants have to file the Form 489. We are amending the rule to prescribe time limits. Form 489 must be filed no later than the date on which the licensee commences service to the public. It may be filed earlier than that date as long as it specifies the date of commencement of commercial service. We emphasize that, with the exception of wireline cellular licensees, licensees may provide service to the public after completing construction, without a separate service test phase. *See NPRM*, 47 Fed. Reg. 43842 at 43870, 95 FCC 2d at 774 and case cited therein. *See also Miami CGSA, Inc.*, Mimeo 4507, released May 31, 1984, at paras. 18-21. We are also clarifying Section 22.212 to eliminate the reference to service tests because a separate service test section is no longer necessary.

5. Fisher, Wayland, Cooper and Leader (Fisher) state that the new procedures will deprive licensees from having licenses with up-to-date information about their facilities. Instead, licensees would have to store copies of filed Forms 489's to possess accurate information. They argue that the Commission should at least provide ready access to its data base, with certified printouts of licensing information, so licensees could obtain

[1] The term "central office station" has relevance to licensing in the Rural Radio Service and will be retained in the definitions section.

documentary evidence of the current status of their licenses in order to correct errors on a timely basis if any occur. Wilkie, Farr and Gallagher agree that the Commission should provide licensees with a ready means of access to current license information as reflected in the Commission's data base.

6. We believe our new application procedures are more efficient than the ones we had in the past. By eliminating the two-step application process we have simplified the licensing procedures and assured that applicants will be able to go on the air expeditiously.[2] If we were to issue modified authorizations each time a Form 489 were filed, the delays and complications that this simplified process was intended to eliminate would be reintroduced. Accordingly, we will not issue a new authorization upon receiving a Form 489.[3] The engineering data from these notifications will be entered into our data base, however, and when a new authorization is issued for an affected station for other reasons (such as renewal, the addition of frequencies, or other major changes) the revised information will be reflected in the authorization.[4]

7. *Permissive Changes or Minor Modifications of Authorization, Section 22.9(d).* In response to the comments we are clarifying Section 22.9(d) adding other categories of minor modifications or permissive changes (those not requiring prior authorization) which were inadvertently omitted from the rule: addition of transmitters pursuant to Section 22.117(b); the filing of Form 489 to return the license to its original specifications when a partial assignment is not completed; requests for extensions of time to complete construction; and reinstatements of authorizations submitted within 30 days after the expiration of the authorization. Reinstatements are requested when the licensee fails to request an extension of time to complete construction and the license

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[2] We have amended Section 22.27 creating an exception to the public notice requirements for requests for developmental authorizations (Subpart F of Part 22), when no waiver of Section 22.404(d) is requested (no service to the public is proposed). This is a rule of practice and procedure and is therefore exempt from the notice requirements pursuant to Section 553(b) of the Administrative Procedure Act, 5 U.S.C. §553(b). Moreover, a request for authority for purely technical testing purposes not entailing the provision of any communications service to the public is not subject to the public notice provision of 47 U.S.C. §309(b), because it does not involve an application for an instrument of authorization for common carrier service. *See* MCI Cellular Telephone Company, FCC 84-53, released February 24, 1984, where we stated our intention to amend this rule.

[3] Licensees should retain copies of the Form 489 notifications as evidence of authorization, until a revised authorization is issued when subsequent major applications are granted, as described below.

[4] We note that the Commission has adopted a *Report and Order* that will allow the public access to its data base through a contractor to be supervised by the National Technical Information Services. *See* Allowing the Public Direct Remote Access to Commission Computer Data Bases, Gen. Docket No. 83-483, FCC 84-387, released August 23, 1984.

expires or licensee fails to timely file a renewal application.[5] We are also amending Section 22.9 to modify a section that has created the potential for interference for instance, making engineering studies more difficult. Section 22.9(d)(5) permitted licensees to perform engineering changes by notification that would either decrease their service contours or increase them by no more than one mile. The increase of a licensee's service contours by even one mile, however, can affect the engineering of other co-channel licensees and applicants. We conclude that, while minor, any small increase in service contours of a station in the Public Land Mobile Service should be the subject of an application rather than a notification; the grant of such an application will be placed on public notice to inform others of the engineering change.[6] *See* Section 22.23(c)(2). Licensees are required to notify us of any minor modifications or permissive changes on a Form 489 no later than the date they start providing service on the modified facilities.

8. We take this opportunity to clarify permissive changes for the Cellular Radio Service. In the cellular service the protected service area is the Cellular Geographic Service Area or CGSA.[7] *See Cellular Communications Systems*, 86 FCC 2d 469 (1981), *modified*, 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982), *appeal dismissed sub nom.* U.S. v. FCC, No. 82-1526 (D.C. Cir. March 3, 1983); *recon. denied*, 56 RR 2d 1583, FCC 84-416, CC Docket No. 79-318 released October 19, 1984 (*Memorandum Opinion and Order*). Facility changes or engineering modifications which do not increase the CGSA are considered permissive, and therefore require only notification, as long as the resultant 39 dBu contours of each cell remain within the authorized CGSA. For example, adding transmitter locations under Section 22.117(b) does not require prior authorization. In addition, a change in or an addition of a radio frequency to a cellular system is a permissive change. *See generally* Public Notice, Major, Minor, and Permissive Changes to Authorized Cellular Radio Systems, Report No. CL-175, released November 23, 1984.

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[5] Previously we listed changes in emissions as minor modifications. We have further refined our rules on emissions and find the minor modification classification is no longer needed. *See* discussion of Section 22.104(a), *infra.*

[6] Goetz E. Mendelson seeks clarification of the phrase "within a year of the license grant" in Section 22.13(f)(1). License grant means the grant date specified on the authorization issued to applicants, which includes a one year construction period within which the licensee must procure state certification. The one year limit of course does not apply to cellular licensees since they have three years to construct.

[7] Changes which result in an increase in the CGSA or the extension of any 39 dBu contour outside the presently authorized CGSA, are major modifications pursuant to Section 22.23(c)(3). These changes have to be filed on FCC Form 401 and require prior authorization. See Section 22.903(d).

9. *Interference studies, Section 22.15(b).* We revised this rule, adding language requiring that the co-channel interference studies be concluded within 60 days prior to the filing of the application. We also corrected the minimum mileage separation standard which requires an interference study for paging stations. Finally, we did not require that the supporting data and calculations be furnished with the application but rather be made available upon request.

10. Jubon filed a petition for reconsideration of this rule section. Jubon suggests that a list of all co-channel stations within 125 miles be prepared and in addition that those beyond the scope of Section 22.502 and 22.503 be studied to determine whether they operate under a waiver of the height and power limits set in Section 22.505.[8] Our experience indicates that, if the proposed station is not accompanied by a request for a height-power waiver, the probability of harmful co-channel interference at distances greater than the range in Sections 22.502 and 22.503 is extremely rare. Furthermore, the area required to be studied, and therefore, the burden on applicants in compiling such a list, would be more than doubled. We think, on balance, these more exhaustive engineering studies are not justified.

11. With respect to proposed stations which request a height-power waiver only along one or more specific radials (but not in general), Jubon suggests that the potentially interfered-with co-channel station(s) be studied to a distance of 125 miles on a continuous arc lying 45° to either side of the affected radials. Section 22.15(b)(1)(ii) provides that only those directions in which the proposed station exceeds the height-power limits need be studied to that distance.[9] Indeed, these directions might include a 45° arc. Jubon has not persuaded us, however, that the probability of interference is sufficiently high to warrant the routine imposition of this additional burden on applicants.

12. The supplement to Sections 22.502 and 22.503 suggested by Jubon, prescribing indicated engineering action on stations operating under a waiver of the height-power limits set in Section 22.505, does remove an ambiguity in these sections. We are incorporating it into the rules. Therefore, any station with an antenna height more than 500 feet above average terrain, but with an effective radiated power within the limits prescribed in Section 22.505 shall be considered a Class A station. Section 22.502(b). Any other station is considered to constitute a special case requiring an interference study toward any co-channel facility within 125

[8] Section 22.505 provides limitations on the combination of effective radiated power and antenna height above average terrain.

[9] We are amending Section 22.15 (b)(1)(ii) to make clear our intent that the combination of effective radiated power and antenna height above average terrain of the *proposed* station is the factor triggering the need for a 125-mile search.

miles. We also welcome Jubon's suggestion that Section 22.905 (cellular) comport with Section 22.505 (non-cellular) in representing height-power station limits in a tabular rather than analog format. We have amended this rule accordingly.

13. *Topographic Maps, Section 22.15(j)(8).* We eliminated the requirement that applicants submit topographic maps as part of the application, requiring instead that they be retained as part of the business records to be made available to the staff upon request.[10] We conformed this section to Section 22.115(c)(2) allowing the use of computerized terrain data for the computation of average terrain elevations.

14. Hatfield & Dawson (Hatfield) and Maxcell Telecom Plus, Inc. (Maxcell) seek reconsideration of that part of the order specifying the computerized data to be used for the computation of average terrain elevations. Specifically, they disagree with the rules in various services (i.e., private and common carrier land mobile systems) that require use of different specific sources of digitized data[11] and request that the Commission adopt a uniform standard.

15. In a separate proceeding, the Commission has now established uniform procedures for using digitized terrain data when determining antenna's height above average terrain. *See Standardized Use of Digitized Terrain Data for HAAT Calculations,* General Docket No. 84-705, FCC 84-594, released December 10, 1984. Since the concerns raised by Hatfield and Maxcell have now been fully addressed by the Commission, their petitions in this respect are now moot.

16. *Need showing for fill-in transmitters, Section 22.16.* In response to questions from the public, we have added Section 22.16(e) to make clear that no need study is required for fill-in transmitters for existing stations, where the coverage of the fill-in transmitters is at least 50 percent covered by existing transmitters. *See* Public Notice #002411, July 27, 1981.

17. *Major Amendments, Section 22.23(c).* We revised this rule which lists the categories of major amendments by eliminating various categories listed in the old rules. Kadison, Pfaelzer, Woodard, Quinn & Rossi (Kadison) in a petition for partial reconsideration request that language eliminated from Section 22.23(c)(4) be reinserted. This subsection classified as a major amendment a substantial change in beneficial ownership or control. Kadison asserts the language in the new rule is ambiguous and

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[10] We are making an editorial change to Section 22.15(j)(8)(iv) to correct a typographical mistake.

[11] Section 22.115(c) permits use of elevation data supplied by the National Geophysical Data Center (NGDC), while Section 90.309(a)(4) allows use of digital terrain data tapes provided by the National Cartographic Information Center (NCIC), U.S. Geological Survey.

the phrase "such that a change would require in the case of an authorized station the filing of a prior assignment or transfer of control application" should be added. In the alternative, Kadison argues, it should be made clear that the change was a mere simplification not intended to change the meaning of the rule. Wilkie, Farr & Gallagher support Kadison, asserting that the criteria of Section 310(d) of the Communications Act still apply to this rule.

18. Kadison has not demonstrated that the rule is ambiguous or that it is necessary to add the suggested language. We emphasize, however, that Section 310(d) of the Communications Act governs changes in ownership or control and that we did not intend to change the meaning of the old rule but merely to simplify it.

19. *Informal Objections, Section 22.30(b) and (c).* We eliminated the rule allowing informal objections to applications to be filed. Kadison objects to not allowing informal objections to be filed against applications, stating that the 30 day deadline for formal petitions is unduly burdensome. Furthermore, according to Kadison, this is contrary to Section 309(d)(i) of the Communications Act and contrary to the public interest.

20. We rejected similar contentions filed by Kadison in the *Report and Order* revising Part 22. *See* 95 FCC 2d at 796. We have not been persuaded now that our original decision was incorrect and we will deny Kadison's request. As we stated before, in the past the rule permitting informal objections has caused delays in the processing of applications. The staff spends approximately the same amount of time resolving informal objections as they spend on formal objections. The consideration given to these objections is often not materially different from the consideration given to formal objections. We continue to believe that it is not unreasonable nor unduly burdensome to require that objections be presented consistent with the requirements of Part 1 of the rules. Moreover, we disagree with Kadison that our action violates Section 309(d)(1) of the Act. This Section provides that the Commission may prescribe a time limit for filing petitions to deny any applications, " . . . no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such applications . . . . " 47 U.S.C. §309(d)(1). By limiting filings to petitions to deny we are in fact complying with the provisions of the Act.[12]

[12] We recognize that the Commission may, under the public interest standard, consider any other materials properly before it in acting on applications. Objections not in the form of a petition to deny, however, do not give rise to the right to a "concise statement of reasons" guaranteed to a petitioner. *See* 47 U.S.C. § 309(d)(2). An interested person submitting information in a manner not consistent with the Rules, therefore, foregoes the right to a statement of reasons for any action taken.

21. *Additional Frequencies, Section 22.31(e).* We added a new section which provides that when an applicant requests a frequency which is mutually exclusive with another application, it cannot in the same application request additional frequencies which are not mutually exclusive with the first application. The additional frequencies must be applied for in a separate application.

22. Kadison alleges that this rule may create unnecessary problems. Applications could be dismissed for failure to comply with the rule because a public notice announcing a mutually exclusive application may be released between the time when a frequency search is completed and when the application is actually filed. It would make more sense, according to Kadison, to require a frequency search study to be made with data that is current within 60 days prior to the application being filed. If mutual exclusivity arises after the date of the *study* an applicant could amend, without penalty, to sever its frequency requests. Telocator Network of America (Telocator) agrees with Kadison and adds that Section 22.15 should be amended to permit acceptance of applications if the engineering certification predates public notice of the acceptance of an earlier application for a mutually exclusive frequency. Fisher states the Commission's goals could be achieved by requiring applicants to divide their station requests by amendment when notified to do so by the Commission. According to Fisher, this would ease administrative burdens without subjecting applicants to the extreme jeopardy of dismissal created by the new rules.

23. We do not agree with the commenters. We believe our standard is less burdensome for applicants as well as more administratively efficient. The comments in this proceeding convinced us that some standard was necessary, since the rule as proposed did not contain one. We therefore added an objective test: if the first application has been placed on public notice, the second applicant is charged with constructive knowledge and must request additional frequencies in separate applications. Any nonconforming application will be dismissed in its entirety. If, however, the first application has not appeared on Public Notice at the time the second application is filed, we will assume that the second application was filed without notice of the mutually exclusive application. In such cases (expected to be few), we will permit the second applicant to sever its mutually exclusive portion *nunc pro tunc. See* 95 FCC 2d at 798. We have not been persuaded by the comments that the rule need be changed or that the tests proposed by the commenters are better than the one already adopted.

24. *Period of Construction, Section 22.43.* We revised this rule and established 12 months as the period for construction in services other than the cellular radio service. We stated that we would rely on the grant date

printed on the authorization for consistency and uniformity in determining the period of construction and other time limits. Generally, the applicant receives the authorization before the action is placed on public notice. We also stated that occasional administrative problems could delay issuance of the authorization beyond the public notice date. We also adopted rules concerning extensions of time to complete construction.

25. Kadison objects to using the date printed on the authorization as the date of license grant. Station authorizations, according to Kadison, are generally received subsequent to the release of the public notice announcing the grant and the date of the authorization generally antedates the public notice by several weeks. Kadison asserts that companies make business decisions based on deadlines, yet under the procedures in the new rules the construction deadline is usually not known for some time after the construction period has begun. Kadison argues that the date the grant is placed on public notice should be the date from which the one year construction period as well as the 90 day period in 22.43(b) (regarding a demonstration of due diligence) are calculated.

26. We believe that as a general matter it is less burdensome for both the public and the staff to use the date printed on the license as opposed to the alternatives recommended by Kadison. The licensee, upon receiving an authorization, is on clear notice of the grant date and construction deadline. Administratively, to establish the public notice date as the grant date could result in a substantial delay in the issuance of authorizations.[13] We disagree with Kadison that this is unfair from a business perspective. The licensee is free to act in reliance on the announcement of a grant in a public notice. In view of the above, we deny reconsideration of this rule.[14]

27. *License Period, Section 22.45.* We amended the rules to provide a ten year license period and establish some new renewal dates. Kadison offers an alternative to the processing problem which now occurs since so many renewal applications are due to be filed at the same time. It suggests that a filing period between 30 to 60 or up to 120 days prior to expiration should be established to relieve burdens on applicants and the Commission.

28. We do not think it necessary to establish this filing window. In the past we have handled renewals without major administrative burdens. Moreover, renewals occur only every 10 years. We believe that requiring all renewals for a particular service at the same time is more efficient and less burdensome. We are however, amending this rule to clarify that the renewals in the same service will in fact all occur at the same time.

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[13] The additional delay would be caused by the need to update the licensing data base after the public notice has been issued.

[14] We have effected minor changes to Sections 22.43 and 22.44 to clarify when extensions of time to complete construction and reinstatement applications may be filed.

29. *Emission types, Section 22.104.* We amended this rule to permit routine approval of digital emissions. Recently this rule was amended to incorporate new emission designators to implement the Final Acts of the 1979 World Administrative Radio Conference, Geneva, Amendment of Part 2 to Implement 1979 WARC, General Docket No. 80-739, FCC 84-510, released November 27, 1984. We are further clarifying this rule to state that all emissions listed in this section will be automatically included in radio station authorizations, provided the applicant is employing type accepted equipment. However, requests for emissions other than the ones listed in this section will require prior authorization and shall be filed on FCC Form 401.[15] We also made minor editorial changes to subsection (a)(3)(i), previously (a)(2)(i).[16]

30. *Transmitter Power, Section 22.107.* We deleted portions of this rule which had become obsolete through developments in technology. Also, we eliminated references to maximum power output authorized for transmitters, requesting instead rated power output as a means of computing effective radiated power (ERP).

31. Jubon suggests the rule be modified because there appears to be no basis for the rule as it applies to standby base stations. Furthermore, the rule should be changed to conform it with Section 22.117(b) (additional transmitters), according to Jubon.

32. We agree with Jubon that the rule needs to be modified, but not precisely as requested by Jubon. We are changing the title of this section to "Standby Facilities". We are providing that standby facilities will be authorized when the resultant reliable service area and interference contour do not exceed those of the facilities which are being replaced.

33. *Transmitters, Section 22.117.* We made various changes to this rule; in subsection (a) we kept language concerning location of transmitters and eliminated the language concerning engineering considerations to be used in selecting transmitter sites. Also, in subsection (b) we provided that additional transmitter locations may be constructed without prior authorization, as long as the Commission is notified (FCC Form 489), and the authorized service area is not increased in any direction.

34. We do believe that this rule needs clarification *vis a vis* cellular service as a result of questions from members of the public and our own experience applying the rule. As we stated in the discussion of Sections 22.9(d) and in response to repeated questioning from members of the

[15] As a result of the changes we have made here we eliminated Section 22.9(d)(1) which provided that changes in or additional authorized emission were minor modifications to be filed on an FCC Form 489.

[16] Because certain sub-sections of Section 22.103 (standards governing use of 72-76 MHz band) were consolidated into Section 22.501(f), we believe this rule is no longer necessary and has been deleted.

public as to the rules applicability, we repeat, this section applies to the cellular service as long as the 39 dBu contours on each cell remain within the CGSA. *See* Sections 22.9(d). This section allows construction and operation of additional transmitter locations merely by notifying the Commission. We emphasize however, that if the notification given by the licensee is not sufficient, or if the licensee's proposal is not in fact encompassed or allowed by this rule, the licensee must cease operation of the transmitter immediately upon the discovery of noncompliance or notification by the Commission.[17]

35. In addition, our experience with the rule has demonstrated the need for the licensees to certify that the reliable service area contour and predicted interference contour of the proposed station are totally encompassed within the reliable service area contour and predicted interference contour of the existing station. In the case of cellular service, the licensee certifies that the 39 dBu contours of each cell remain within the CGSA. In addition, this certification must include the following information: licensees must provide a complete location description including geographic coordinates of the proposed facilities, submit a table of engineering specifications showing effective radiated power (ERP), radiation center height above average terrain for the eight radials, and an antenna sketch. This is necessary in order to provide appropriate protection to the new location in the future.[18]

36. Rule section 22.117(b)(3) states that FAA approval must have been obtained and clearance granted before filing Form 489. If FAA clearance has not been granted a Form 401 must be filed for prior approval before construction and operation. Section 22.117(b) will always be applicable to antenna structures not exceeding 20 feet in height, or antennas mounted on existing structures, if the height of the overall structure is not increased (these do not require FAA clearance). If the application involves an existing tower the licensee must also submit marking and lighting specifications from Forms 715 and/or 715a in order that future authorizations will reflect this accurately. In addition, section 22.117(b) applies only to stations on the United States side of line A and C as defined in section 1.955; otherwise prior Commission approval is required and the licensee must file a Form 401. Licensees must always comply with the require-

[17] The additional transmitters are considered "satellites" of the main station. If there are any changes to the main station which would change the status of the "satellite" (for instance, deletion of the main station or change in technical parameters), such changes require prior approval (filing of FCC Form 401).

[18] This rule does not apply to stations using 43 MHz band frequencies. They need developmental grants for additional transmitters.

ments of Part 17.[19]

37. *Incidental Communications Services, Section 22.308.* We adopted a rule stating the general conditions under which incidental communication services may be provided. AMCOM, Inc. filed a petition for reconsideration[20] alleging it will be adversely affected by this rule which allows Public Land Mobile licensees to provide service to vessels and eliminates the restriction (section 22.509(b), (c)) which precluded these licensees from rendering service to stations on board vessels in areas served by VHF public coast stations, such as those operated by AMCOM. AMCOM alleges the Commission should give reciprocal authority to maritime carriers to serve vehicular traffic. The Commission's actions, according to AMCOM, will drain its customer base while not permitting it to replenish its subscriber base by offering service to non-maritime parties. AMCOM states that the issue of expanded Public Land Mobile Service was directly raised in the General Docket No. 81-656 proceeding, *Redefinition of Classes of Coast Stations,* FCC 83-5, released January 19, 1983, and deferred to this Part 22 rewrite proceeding and that by failing to mention the comments filed in the General Docket 81-656 proceeding in the Rewrite of Part 22 proceeding, the Commission violated the Administrative Procedure Act §553(c). Moreover, according to AMCOM the Commission also erred in its findings that any amendments to the rules concerning public coast stations were beyond the scope of the proceeding. According to AMCOM, this was part of the proceeding by virtue of the Order in the Docket 81-656 proceeding and the Commission was bound to consider the counterproposal for public coast stations.

38. Marine Telephone Co., Inc. (MTC) supports AMCOM's petition and urges the Commission to either reinstate section 22.509(b) or respond to AMCOM's petition for reconsideration by adopting rules that allow maritime carriers to compete in the land mobile market through the adoption of corresponding amendments to Parts 81 and 83 of the rules. It was improper for the Commission to expand service opportunities of land mobile carriers without removing restrictions on service by maritime carriers, according to MTC.

39. We will not reconsider our decision to permit Public Land Mobile licensees to provide service to vessels. Provision of such service was traditional before the adoption of Sections 22.509(b) and (c), which were adopted to foster the development of the VHF maritime public coast

[19] If a licensee needs a waiver of a Commission rule for construction and operation of the additional transmitter, this will require prior Commission approval before construction and operation. A licensee may not presume the grant of a waiver and go into operation upon notification.

[20] AMCOM also filed a request for stay of the effectiveness of Section 22.308 alleging the Commission's action will cause it irreparable injury. Because of our decision here we are denying AMCOM's request for stay.

station industry. We will further consider whether public coast station licensees should be permitted to offer subsidiary service to land vehicles but do not feel that the record to date either in this proceeding or in General Docket No. 81-656 *supra* adequately addresses all aspects of our concerns with respect to this issue. Accordingly, we will initiate a new proceeding to consider the proposals of AMCOM.

40. *Forms.* As part of the Part 22 Rewrite we eliminated old forms and adopted new ones. Various additional comments were filed with the petitions for reconsideration concerning the forms which have been considered and some implemented. For instance, minor typographical errors or corrections have been noted. Other more substantive comments have been submitted.[21] No new evidence has been presented to persuade us to depart from our original conclusions. Accordingly, we will not revise our forms any further.

41. *Waiver of Frequency Allocation, Section 22.501(n).* Various parties filed partial petitions for reconsideration of the interim policies adopted for filing of applications during the pendency of the rulemaking on elimination of the separate frequency allocation. We considered and denied these petitions in the rulemaking dealing with elimination of the separate frequency allocation. *See Elimination of the Separate Frequency Allocation*, 99 FCC 2d 311 (1984).

42. The following amendments which clarify our rules are non-substantive, therefore, the notice and comment provisions of the Administrative Procedure Act are inapplicable. *See* 5 U.S.C. §553. These amendments are: §22.2; 22.9(b); 22.13(f)(1); 22.15(j)(8)(iv); 22.15(b)(1)(ii); 22.43(c); 22.45; 22.101(a); 22.110; 22.113(b)(1)(ii)(iii) and (iv); 22.505; 22.515; 22.525; 22.601; 22.906(a) - (c) and 22.1006.

43. Additionally, while we also believe the remaining alterations are non-substantive, they are arguably substantive. Nevertheless, we believe good cause exists for dispensing with the APA's requirements. The rule changes throughout this proceeding respond to our policy of eliminating unnecessary government regulation and easing burdens for the public where possible. Similarly, these minor changes ease burdens on our licensees and eliminate duplicative or unnecessary rules. We have also clarified the language of certain rules where we felt were not clear

[21] In the Report and Order we rejected AT&T's proposal that the rules routinely allow experimental market trials. *See* 95 FCC 2d at 820. Even though the Commission has authorized limited market studies in the experimental radio services, we are not persuaded that the same should be authorized routinely in the developmental services. Developmental service should constitute, with few exceptions, technical tests. Applicants wishing to provide service to the public under a developmental authorization should request a waiver of the rule, and their applications will be subject to public notice. Market trials, therefore, should only be authorized when adequately justified and approved by the Commission. 95 FCC 2d at 820.

enough. In light of the generally beneficial and non-controversial nature of these rule changes, notice and public comment on these changes is unnecessary and not in the public interest. These rule changes are: 22.9(b); 22.15(b)(1)(ii); 22.16(e); 22.27; 22.43(a)(b); 22.44(a); 22.100(e)(f), (g)(3)(4); 22.103; 22.104(a)(1)-(3); 22.107; 22.117; 22.201(b); 22.208; 22.212; 22.501(f)(i); 22.600; 22.906(d); 22.1002.

44. Accordingly, IT IS ORDERED, that the petitions for reconsideration filed in CC Docket No. 80-57 ARE GRANTED to the extent indicated herein and otherwise DENIED.

45. IT IS FURTHER ORDERED, that pursuant to the authority found in Section 154(i), 301 and 303(r) of the Communications Act of 1934, as amended, Part 22 of the Commission's Rules and Regulations ARE AMENDED as specified in Appendix B. These amendments shall become EFFECTIVE 30 days after publication of this Order in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

*Appendix A-may be seen in FCC Dockets Branch, 19191 M Street, N.W., Wash., D.C.

Equipment Authorization
Equipment Industrial, Scientific and Medical
Radio Frequency Device, Marketing
Rule Making, Petition for
Rules, Waiver of
Technical Requirements

Order addresses petitions seeking changes in authorization and labelling requirements set forth in the Commission's Order Granting Limited Waiver for marketing RF lighting devices. RF lighting devices intended for commercial or industrial use must be verified; devices intended for consumer use must be certified.
—*RF Lighting Devices*

FCC 85-469

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Two Petitions Filed by the National Electrical Manufacturers Association to Change the Requirements for Marketing RF Lighting Devices

MEMORANDUM OPINION AND ORDER

Adopted: August 12, 1985; Released: August 30, 1985

BY THE COMMISSION:

1. The National Electrical Manufacturers Association has filed two petitions seeking changes in the requirements manufacturers must meet before they can market RF lighting devices. One petition seeks to replace the pre-marketing waiver and certification requirements imposed in the Commission's *Order Granting Limited Waiver*[1] with an informational filing. The other seeks changes in the wording of the label required on packages containing these devices. This Order makes clear that changes recently adopted for Part 18 of the Commission's Rules apply to RF lighting devices. As a result, waivers are no longer necessary, and

[1] *Order Granting Limited Waiver*, FCC 83-361, released August 5, 1983.

certification is required only for RF lighting devices produced for consumer use. The labelling requirement is replaced by a user information requirement.

2. RF lighting is a broad term that applies to new technologies being developed for more efficient lighting, whereby electrical power is converted to radio frequencies and is used to excite a gas inside the bulb, causing the bulb's fluorescent coating material to glow and give off light. RF lighting products are being developed for both home and industrial use. Some types are intended as replacements for standard household incandescent light bulbs, and others are designed to be used with fluorescent light fixtures.

3. Because RF energy is used to excite gases and materials, these lighting devices are subject to the requirements for miscellaneous industrial, scientific and medical equipment contained in Part 18 of the Commission's Rules. However, these rules were originally intended for industrial equipment produced in relatively low quantities and used in remote areas. They have posed two problems with respect to RF lighting devices. First, the requirements of former Section 18.142(c) that each individual device be recertified after three years was impractical for mass produced products such as lighting devices. Second, the Part 18 limits on radio noise have been too lax in the past to protect against interference in residential environments, where many of these lighting devices may be used. Of particular concern is possible interference to AM radio reception.

4. In order to seek relief from the Commission's requirements, three RF lighting manufacturers petitioned the Commission for a waiver of the recertification requirement. The Commission, in July 1983, adopted the *Order Granting Limited Waiver* of the requirement for certain RF lighting devices, and it delegated authority to the Chief Scientist to grant waivers to other manufacturers who could meet the same conditions. The purpose of the waiver was to allow prompt introduction of this new technology into the marketplace and to permit the Commission to gain further experience with regard to potential interference from these devices. The waiver was subject to technical and administrative conditions, including the following:

(1) complying with the technical requirements for computing devices set forth in Part 15, Subpart J;

(2) receiving certification of compliance with these Part 15 requirements prior to marketing; and

(3) labelling the packages to warn users of potential harmful interference to broadcasting services.

At the same time, the Commission issued a *Notice of Inquiry* (NOI) in Gen. Docket 83-806 to gain further information on how interference from

these devices can best be controlled.[2]

5. On February 7, 1984, NEMA submitted its petitions. The first petition proposes an alternative to the waiver procedure so that the delay and administrative burden of introducing new products can be reduced while the Commission considers final rules for RF lighting devices in Gen. Docket 83-806. In place of the waiver procedure and certification requirements, NEMA proposes that the manufacturer forward models of RF lighting devices to the Commission along with test data and the manufacturer's certification that the tests are accurate and representative of the product. The devices would be evaluated according to emission limits set by the Commission, presumably the limits for computing devices set in the *Order Granting Limited Waiver.* NEMA further proposes that the Commission require periodic reporting of consumer complaints regarding RF lighting devices, that manufacturers take any corrective action the Commission would find appropriate, and that the Commission suspend the recertification requirement. The thrust of the petition is that manufacturers provide the Commission with information about RF lighting devices prior to marketing but that requirements for premarketing approval by the Commission be removed.[3]

6. NEMA's second petition requests amendment of the language on the label. Specifically, NEMA is concerned that the term "harmful interference" used on the label might be construed by consumers as meaning the device poses biological hazards.[4]

7. The National Association of Broadcasters (NAB) filed comments opposing both petitions. NAB expressed concern about interference to AM radio reception from these devices and argued that, while rules for RF lighting devices are being developed, the Commission should gain further experience with the devices through its equipment authorization program. NAB also argued against revising the labelling requirement.

8. The Commission continues to be concerned about potential interference, particularly to AM radio reception, from RF lighting devices.

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[2] *Notice of Inquiry,* Gen. Docket 83-806, FCC 83-360, 18 Fed. Reg. 37235 (1983).

[3] NEMA's proposal is a hybrid of the certification and verification parts of the Commission's equipment authorization program set forth in Part 2, Subpart J, of the Commission's Rules. Certification requires the submission of a written application and test results to the Commission. In some cases samples may also be required. The Commission may then issue a Grant of Certification, which is a prerequisite to legal marketing of the product. Verification is a self approval process whereby the manufacturer is merely required to retain a record of compliance measurements in its files.

[4] The exact test of the required label reads as follows:

> This device is being sold pursuant to a waiver of FCC rules as part of an experiment to determine whether it causes harmful interference to AM radios in or around the user's dwelling. Any interference should be reported to (fill in company name, contact person, and address).

However, it shares some of NEMA's concerns about interim procedures that may be unduly burdensome. In the *Third Notice of Proposed Rule Making* in Docket 20718, adopted in November, 1984,[5] after NEMA's petitions were filed, the Commission proposed a comprehensive review of the authorization and administrative requirements for equipment subject to Part 18, including recertification and labelling requirements. The *Notice* included modifications to the equipment authorization program which would also apply to RF lighting devices and it proposed interim technical standards specifically for RF lighting devices pending further action in Gen. Docket 83-806.

9. The rules adopted in the *Third Report and Order* in Docket 20718[6] as a result of this *Notice* go a long way toward alleviating the burden NEMA complains resulted from the Commission's *Order Granting Limited Waiver.* The Commission eliminated the three year recertification requirement for all ISM equipment and, by doing so, eliminated the need for RF lighting device manufacturers to seek a waiver before marketing new or modified devices.

10. The Commission also clarified and simplified the equipment authorization program for ISM equipment by placing all nonconsumer ISM equipment under the verification program and by placing all consumer ISM equipment under the certification program.[7] Thus, RF lighting devices manufactured for commercial or industrial use can be marketed without prior Commission approval and without submitting data or samples to the Commission once the verification requirements of Part 2, Subpart J, of the Commission's Rules are met. RF lighting devices intended for or likely to be used in residential environments, however, will continue to be subject to the certification requirements of Part 2, Subpart J, of the Commission's Rules as they had been pursuant to the conditions of the *Order Granting Limited Waiver.*[8] While NEMA has proposed manufacturer certification to show RF lighting device compliance with the appropriate technical standards, this is not a sufficient substitute for Commission review of data through the equipment authorization program, particularly since the interference potential of these devices is still being studied in Gen. Docket 83-806. These devices typically are mass

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[5] *Third Notice of Proposed Rule Making*, Gen. Docket 20718, FCC 84-578, 49 Fed. Reg. 47628 (1984).

[6] *Third Report and Order*, Docket 20718, FCC 85-445, 50 Fed. Reg. 36061, Sept. 5, 1985.

[7] *Id.* at Appendix B, §18.203.

[8] For purposes of the Commission's rules, consumer lighting products will be considered to be those which are designed to operate on standard household 110 volt, 60 hertz AC electric power, and are mass-marketed to the general public. Commercial/industrial products will be considered those which exhibit any of the following: (1) restricted distribution to businesses; (2) requires custom installation; (3) operates on other than 110 volts, 60 hertz AC.

produced and, therefore, have a far greater potential for causing interference to AM broadcast reception than devices produced in limited numbers for use in commercial or industrial environments where AM radio listening is not likely. Furthermore, the information NEMA would have manufacturers submit pursuant to its proposed interim procedures is the same information required by the Commission's certification requirement. The only difference is that the Commission must evaluate the data before marketing starts.[9]

11. Finally, in the *Third Report and Order* in Docket 20718, the Commission replaced the labelling requirements imposed on some ISM equipment with an information requirement. New Section 18.213 requires that:

> Information on the following matters shall be provided to the user in the instruction manual for any type of ISM equipment:
>
> — The interference potential of the device or system
>
> — Maintenance of the system
>
> — Simple measures that can be taken by the user to correct interference.[10]

In the case of RF lighting devices, this information requirement is preferable to the language dictated by the Commission in the *Order Granting Limited Waiver.* It provides for informing the public without causing possible confusion about the term "harmful interference" and, thus, should satisfy the concerns of both NEMA and NAB. However, to make certain that all users of RF lighting devices receive the information specified in new Section 18.213, we are requiring that manufacturers who do not provide a separate instruction manual with an RF lighting device will be required to include the information in or on the package containing the device.

12. In conclusion, when the revisions to Part 18 adopted in the *Third Report and Order* in Docket 20718 become effective, manufacturers of RF lighting devices will no longer need special waivers before they can market these devices. All RF lighting devices will be expected to meet the technical standards for computing devices set forth in Part 15, Subpart J, of the Commission's rules, and those produced for consumer use as defined in note 8, *supra,* will need Commission certification before they can be marketed. All devices must also be accompanied by information about interference and maintenance.

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[9] The *Third Report and Order* specifically applied the technical standards for computing devices to RF lighting devices, pending the development of rules in Gen. Docket 83-806. These are the standards applied by the Commission in the *Order Granting Limited Waiver*; they were not challenged in NEMA's petitions.

[10] *Third Report and Order,* Docket 20718, FCC 85-445 50 Fed. Reg. 36061, Appendix B, §18.213 (1985).

13. For the reasons stated above, IT IS ORDERED THAT the Petition to Reduce Administrative Burden of Applying for a Limited Waiver for Certification and Re-Certification of RF Lighting Devices filed by NEMA IS GRANTED to the extent described above AND IS OTHERWISE DENIED.

14. IT IS FURTHER ORDERED THAT the Petition to Change Wording on Labels for RF Lighting Devices Sold Under Limited Waiver filed by NEMA IS GRANTED in the manner described above.

15. IT IS FURTHER ORDERED THAT all RF lighting devices manufactured while Gen. Docket 83-806 is pending include the information required by new Section 18.213 of the Commission's Rules in or on the packaging if an instruction manual is not provided.

17. For further information concerning this Order, contact George Harenberg, Office of Science and Technology, telephone: (202) 653-8104.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Administrative Law Judge, Authority of
Application, Dismissal of
Discovery
Hearing, Conduct of

Review Board denied appeal from ALJ's dismissal of application for applicant's refusal to comply with orders requiring discovery. Dismissal was warranted in view of applicant's contumacious refusal to obey ALJ's order.

—RKO General Inc. (WFYR-FM)
MM Docket No. 84-1085

FCC 85R-60

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
RKO General, Inc. (WFYR-FM) Chicago, Illinois	MM Docket No. 84-1085 File No. BRH-790801A3
For Renewal of License	
East Lake Communications, Inc. Chicago, Illinois	MM Docket No. 84-1086 File No. BPH-830318AA
Johnson Communications, Inc. Chicago, Illinois	MM Docket No. 84-1087 File No. BPH-830429AD
Windy City Broadcasting, Ltd. Chicago, Illinois	MM Docket No. 84-1089 File No. BPH-830512AG

Cozzin Communication Corporation Chicago, Illinois	MM Docket No. 84-1094 File No. BPH 830512BK
South Jersey Radio, Inc. Chicago, Illinois	MM Docket No. 84-1096 File No. BPH-830512CA
For Construction Permits	

MEMORANDUM OPINION AND ORDER

Adopted: July 26, 1985; Released: July 31, 1985.

BY THE REVIEW BOARD:

1. The Review Board has before it an appeal filed on June 3, 1985, pursuant to Section 1.301(a)(1) of the Commission's Rules, 47 C.F.R. §1.301(a)(1), by Johnson Communications, Inc. (Johnson). An opposition to the appeal was filed on June 10, 1985, by RKO General, Inc. (RKO), and a reply was filed by Johnson on June 11, 1985.[1] Johnson takes appeal from *Order*, FCC 85M-2252, released May 24, 1985, in which Administrative Law Judge Joseph Chachkin dismissed Johnson's application for failure to comply with the ALJ's previous discovery orders.

2. By *Order*, FCC 85M-1500, released April 9, 1985, the Presiding Judge, pursuant to RKO's request, directed that Johnson make its principals available for deposition by attorneys for RKO and that it produce various documents for RKO's inspection. On April 25, 1985, RKO filed a motion to dismiss Johnson's application on the grounds that Johnson had failed to produce documents covered by the April 9 order and had failed to make John H. Johnson, its principal, available for deposition. As a consequence of RKO's request, the ALJ issued a *Memorandum Opinion and Order*, FCC 85M-2085, released May 14, 1985, wherein he denied RKO's request, noting that dismissal was a drastic remedy and stating that Johnson should be afforded one further opportunity to comply with his directives. He specifically placed Johnson on notice, however, that failure to produce the documents or to produce Mr. Johnson for deposition would result in the dismissal of Johnson's application. Johnson then filed "Responsive Comments" in which it stated that it

[1] This reply is unauthorized and will be dismissed. *See* Section 1.301(c)(7) of the Rules, 47 C.F.R. §1.301(c)(7).

would produce neither the documents nor Mr. Johnson. Five days later the ALJ issued the order dismissing Johnson's application.

3. It is by now well established that the willful refusal by an applicant to comply with an ALJ's orders, including discovery orders, may result in the dismissal of that applicant's application. *Vue-Metrics, Inc.*, 69 FCC 2d 1049, 1058-59, 44 RR 2d 615, 624-26 (1978); *Mad River Broadcasting Co.*, 97 FCC 2d 679, 680-81, 56 RR 2d 250, 251 (Rev. Bd. 1984); *Faith Center, Inc.*, 52 RR 2d 1547, 1551 (Rev. Bd. 1983). In the face of this well-established law, Johnson asserts that the discovery orders which eventually resulted in the dismissal of its application were illegal. The genesis of Johnson's claim is the Commission's *Memorandum Opinion and Order*, FCC 85-80, released February 25, 1985, in which it restructured the various comparative proceedings, including this one, involving the renewal of RKO's licenses. In that order the Commission ruled that the first phase in each of these proceedings would consist of the resolution of all basic and comparative issues with regard to all of the applicants except RKO, the renewal applicant. From Johnson's pleading it appears that it is arguing both that the procedure the Commission set up is illegal and that the ALJ's orders are improper under those procedures. (*See, e.g.*, "Appeal," paras. 2, 3, and 5).[2] As to the first point, this Board is of course bound by the decisions and rulings of the Commission, *see* §0.362 of the Rules, 47 C.F.R. §0.362, and we are not empowered to rule on the validity of actions of the Commission. All we may do here is rule on whether the ALJ's discovery orders were properly made under the Rules and Commission precedent, and, if so, whether dismissal was a proper sanction under the circumstances for Johnson's failure to comply with the ALJ's orders.

4. The gravamen of Johnson's claim that the ALJ's discovery orders were illegal lies in the ALJ's determination that RKO was entitled to participate in the first phase of this proceeding as a full party. The orders themselves appear to concern routine discovery permitted a party to a proceeding under the Commission's Rules, *see* 47 C.F.R. §1.311 *et seq.* Johnson objects to RKO's being permitted the rights of a "full-fledged" party during the first phase of the proceeding, when consideration of anything involving RKO's qualifications is precluded. The Commission did not directly address in either its February 25, 1985 Order or the June 18, 1985 Order on reconsideration questions of RKO's participation in

[2] As a result of its unhappiness with the bifurcated proceeding set up by the Commission in its February 25 order, Johnson asked for reconsideration of that order, making some of the same arguments contained in the pleading now before us. By *Memorandum Opinion and Order*, FCC 85-315, released June 18, 1985, the Commission denied Johnson's petition for reconsideration. Thus, we need not revisit Johnson's contention (Appeal at 4) that its "Ashbacker" rights are violated by the Commission's procedures. *See* FCC 85-315, para. 11.

discovery in the first phase of this proceeding. However, in the June 18 Order, FCC 85-315, *supra* note 2, at para. 2, the Commission described its earlier Order as permitting "the *parties* to these proceedings to commence *discovery* and hearings on all issues pertaining to both the basic and comparative qualifications of *all non-RKO applicants*" (emphasis added). Moreover, the Commission stated in FCC 85-315 at n. 10:

> [no] party, including RKO, will be entitled to re-litigate the matters now being tried in the present phase of these other proceedings. Hence, the time for all parties, including RKO, to litigate the qualifications of the respective challenging applicants is during the present phase of these proceedings. It is for this reason that RKO is entitled to participate in this phase of the proceeding.

Thus, there is no indication in either document that the Commission intended to exclude RKO or to limit it to anything less than full party status, and we find that the ALJ's decision to allow RKO the full rights of a party to discovery was proper.[3]

5. Rather than comply with the ALJ's valid discovery orders and concurrently challenge RKO's status, Johnson chose instead to defy the orders, thereby simultaneously placing itself outside the law and also shielding its application from scrutiny by competing applicants pursuant to authorized discovery requests. The ALJ placed Johnson on notice that dismissal could result from its noncompliance and gave it one last chance to comply. In view of Johnson's contumacious refusal to comply with the ALJ's valid orders, the dismissal of Johnson's application was reasonable and proper. *Vue Metrics, Inc., supra; Faith Center, Inc., supra.*[4]

6. ACCORDINGLY, IT IS ORDERED, That the "Appeal of Order Dismissing the Application of Johnson Communications, Inc.," filed on June 3, 1985, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

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[3] The Commission's reconsideration Order, FCC 85-315, *supra,* should have laid to rest any fears Johnson may have that it would not receive a full comparative hearing or that it and the other competing applicants would not have a full opportunity to examine RKO's basic and comparative qualifications pursuant to the procedural guidelines established by the Commission. *Id.* at para. 11.

[4] Insofar as Johnson argues that the ALJ improperly ordered the deposing of its principals in Washington, D.C., it has failed to substantiate its claim that the ruling was "arbitrarily onerous."

Alien, Control
Alien, Ownership
Foreign Country Transmission to

Application for permit pursuant to Section 325(b) of the Act accepted for filing notwithstanding the fact that the applicant did not comply with the citizenship requirement contained in Section 310 of the Act. —*Sin, Inc.*

FCC 85-431

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

Sin, Inc.
460 W. 42nd Street
New York, New York 10036

For Authority to Deliver Programming to Mexican Television Stations Pursuant to Section 325(b) of the Communications Act.

Adopted: July 30, 1985; Released: August 2, 1985

BY THE COMMISSION: COMMISSIONER QUELLO DISSENTING AND ISSUING A STATEMENT.

Gentlemen:

This refers to your application filed May 10, 1984, for authority to deliver programming to Mexican television stations pursuant to Section 325(b)[1] of the Communications Act; to the staff action of June 28, 1984, dismissing

[1] Section 325(b) reads as follows:

(b) No person shall be permitted to locate, use, or maintain a radio broadcast studio or other place or apparatus from which or whereby sound waves are converted into electrical energy, or mechanical or physical reproduction of sound waves produced, and caused to be transmitted or delivered to a radio station in a foreign country for the purpose of being broadcast from any radio station there having a power output of sufficient intensity and/or being so located geographically that its emissions may be received consistently in the United States, without first obtaining a permit from the Commission upon proper application therefor.

this application; and to your "Application for Review and for Acceptance of Application for Section 325(b) Authority" filed July 30, 1984 directed against that staff action.

In the staff action it was noted that 75% of the capital stock of SIN, Inc. is owned by Televisa, S.A., a Mexican corporation, and two of the three directors of SIN, Inc. are Mexican citizens. As a consequence, the staff concluded that SIN, Inc. was ineligible for this authorization under Section 310(b) of the Act and dismissed the application. In your application for review, you contend that Section 310 was never intended to apply to applications pursuant to Section 325(b); that the Commission lacks authority to regulate your transborder operation under either Section 310 or 325(b); that Section 325(b) was never intended to "interfere" with the operation of a network; and that refusal to grant a Section 325(b) permit violates the First Amendment.

After careful consideration of this entire matter, we are of the view that while it is within our discretion to impose a Section 310 citizenship requirement on applicants for a Section 325(b) permit, this requirement is not mandated by statute, and we feel that it is overbroad to preclude without more all those who do not meet the citizenship requirement from authority to transmit programming to foreign stations under Section 325(b). We add, however, that there may be instances where factors relating to the non-citizen nature of the applicant may result in a finding that the 325(b) authorization is not in the public interest. We believe that the procedure under Section 325(c) of the Act for the Commission to make a decision based on the requirements of Section 309 of the Act, allows the Commission to consider those other factors as part of the overall public interest determination.

Section 325(b) was enacted to curtail the activities of "outlaw" U.S. broadcasters who used Mexican stations as a means of circumventing Commission licensing authority. See, e.g., Sen. Rep. No. 319, 73rd Cong. 2d Sess. 1 (1934). In order to meet this objective, Section 325(b) requires any person wishing to transmit programming from the United States to a foreign station which can be received within the United States to first file an application and obtain a permit for such authority. Section 325(c) requires the Commission to make the public interest finding contained in Section 309 of the Act with respect to a 325(b) application.[2] Section 309

[2] Section 325(c) reads as follows:

> (c) Such application shall contain such information as the Commission may by regulation prescribe, and the granting or refusal thereof shall be subject to the requirements of Section 309 hereof with respect to applications for station licenses or renewal or modification thereof, and the license or permission so granted shall be revocable for false statements in the application so required or when the

only requires a public interest finding and does not mandate citizenship. Furthermore, the legislative history of Section 325(b) refers to the public interest standard and does not evidence a reference to the citizenship requirement of Section 310. The Senate Committee on Interstate Commerce also stated:

> This bill will not interfere in any way with exchange of programs between the United States and foreign countries because the Commission is authorized to grant permits to those who desire to operate legally and in the interest of the public.

Sen. Rep. No. 319, 73rd Cong. 2d Sess. 1 (1934). See also H. Rep. No. 1037, 73rd Cong. 2d Sess. 2 (1934).

In 1950, the Commission concluded that a citizenship requirement is part of the public interest standard of Section 325. *Informal Applications for Authority to Use Apparatus for Production of Programs to be Transmitted to Foreign Radio Stations,* 12 RR 1618, 1619 (1950), See also *Joe Tom Easley,* 13 RR 1246 (1956). However, we note that neither the literal language of Section 325 or its legislative history suggest that application of the Section 310 citizenship requirement to Section 325 authorizations is mandated by law. Moreover, and contrary to the Congressional intent underlying Section 325, imposition of the citizenship requirement in a *per se* manner appears to restrict unnecessarily the transfer of programming between the United States and foreign countries. In this connection, we note that, under the requested authorizations, SIN would merely be a program supplier to the Mexican station. Therefore, in this case, we see no point in determining the citizenship of a programming supplier when the ultimate programming decision rests with the Mexican licensee, whose programming may be received in the United States regardless of our action on your application. Moreover, using the facilities of a common carrier, you would not exercise control over transmitting devices in the United States. Thus the purposes of Section 310(b) would not be circumscribed.

Accordingly, in discharging our statutory responsibilities in processing a Section 325(b) application, we have decided to no longer impose a *per se* Section 310 citizenship requirement. As noted above, we will consider on a case by case basis whether there are factors relating to the alien status which are relevant to our determination that the grant is in the public interest. We find no such issues in this case. Of course, we retain the right to initially deny or subsequently revoke any such authorization if the public interest warrants such action. In view of this determination, it is

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Commission, after hearings, shall find its continuation no longer in the public interest.

unnecessary to address the remaining arguments advanced in your application for review.

As you are aware, we have designated five television renewal applications for hearing which are licensed to Spanish International Communications Corporation (SICC) (MM Docket No. 83-540 *et seq*). Because two of the issues involve or pertain directly to relationships between SIN and SICC, you were made a party to that proceeding. Therefore, a grant of your application would be without prejudice to the outcome of that proceeding. See *Metroplex Communications of Florida, Inc.*, Commission letter action of May 24, 1984.

Accordingly, IT IS ORDERED, That your aforementioned application IS HEREBY ACCEPTED FOR FILING and will be processed in due course and IT IS FURTHER ORDERED, That the "Application for Review and for Acceptance for Section 325(b) Authority" IS GRANTED to the extent indicated above.

BY DIRECTION OF THE COMMISSION*
WILLIAM J. TRICARICO, *Secretary*

* Commissioner Quello dissenting and issuing a statement

Dissenting Statement of Commissioner James H. Quello

In re: Application for Review and for Acceptance of Application for Section 325(b) Authority filed by SIN, Inc.

In 1950, the Commission stated:

> The standard of public interest, convenience and necessity must be interpreted and applied within the context of the entire Communications Act. [Citations omitted.] In Section 310 of the Act the Congress has indicated that in its judgment the public interest, convenience and necessity requires that United States broadcasting be under the control of citizens only. Where a program is produced in the United States and broadcast over foreign stations that can be regularly received in the United States the practical effect is the same as though the program had been broadcast over a United States station. There is thus no basis for applying a different standard of the public interest to the above operation than to any other broadcast operation. Accordingly, we are of the opinion that it was the intention of Congress that permits required by Section 325(b) of the Act be granted only to persons meeting the citizenship requirements set forth in Section 310.

Informal Applications for Authority to Use Apparatus for Production of Programs to be Transmitted to Foreign Radio Stations, 12 RR 1618, 1619 (1950).

I am not persuaded that the Commission was incorrect in this longstanding interpretation of Sections 325(b) and 325(c) of the Communications Act. Accordingly, I dissent.

Telecommunications Services for the Deaf
Teletext (Television)
Television-Vertical Blanking Interval

Memorandum Opinion and Order adopted addressing petitions for reconsideration regarding *Report and Order* authorizing television stations to operate teletext services. Commission addressed petitions that collectively raise issues concerning six aspects of its decision. Reconsideration was denied with respect to all other issues as petitioners failed to demonstrate any errors or other omissions in the *Report and Order.*
—*Teletext Services*

FCC 84-529

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Transmission of Teletext by TV Stations.	BC Docket No. 81-741 RM-3727 RM-3876

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 1984; Released: January 24, 1985

BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING IN PART.

1. The Commission has before it the "Petitions for Reconsideration" filed by sixteen parties in response to its action authorizing broadcast television stations to operate teletext services, *Report and Order,* 48 FR 27054 (published June 13, 1983).[1] The petitioners seek reconsideration of our policy decisions in the following six areas: 1) the definition of teletext, 2) authority for public broadcasters to operate remunerative services on the text channels of the line 21 caption system, 3) public service

[1] Eleven parties also submitted responses either supporting or opposing the requests for reconsideration, and five parties filed replies to the responses. A complete list of the parties filing petitions, responses/oppositions, and replies on any aspect of teletext reconsideration and lists of the parties participating on each of the major issues requested for reconsideration are provided in Appendix A.

obligations associated with Section 312(a)(7) and 315 of the Communications Act, as amended, 4) regulation of private and common carrier teletext services,[2] 5) cable retransmission of broadcast teletext, and 6) the date the rules were made effective.[3] These issues will be treated in turn.

Teletext Definition

2. Four petitioners request that the definition of teletext be expanded to permit transmission of material not intended for, or related to, visual display purposes.[4] The petitioners believe that there is no reason to delay authorization of non-display data transmissions. They state that the Commission should move forward in this proceeding to allow the widest possible use of teletext technology. Geller, *et al.* (Geller) states that the Commission is repeating the case of FM subcarriers where for years it "unnecessarily restricted subcarrier transmission to 'broadcast-type' transmissions." The National Association of Broadcasters (NAB) argues that the current definition poses another unnecessary obstacle to the full development of teletext. It states that the market should decide whether other services are a proper use of this technology. The Public Broadcasting Service (PBS) does not agree with the Commission's view that teletext is generally understood to be only a visual display medium. The submissions of other parties that addressed this issue, including those filing responses, offer similar arguments for expanding the definition.

3. The petitioners' arguments and statements for expanding the definition of teletext are essentially the same as those that the Commission considered and rejected in the *Report and Order*.[5] In establishing the definition for teletext, the Commission sought to provide authority for the widest possible range of applications and services that is within the generally understood concept of teletext as a visual display medium. Thus, teletext was defined as a data system for the transmission of textual and graphic information intended for display on viewing screens. This definition was expanded slightly to allow transmission of data signals that are useful to widen and enhance the usability of the teletext information in a non-display context. We continue to believe that petitioners' requests are beyond the scope of this proceeding and that there is no basis for changing the definition of teletext adopted in the

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[2] The Commission decided one aspect of the common carrier services issue, that of whether to preempt state regulation of teletext common carrier services, in a separate action. See para. 22, *infra*.

[3] Geller, *et al.* also requested that the Commission consider requiring teletext capability in new color television receivers. As this request is beyond the scope of this proceeding and the action in the *Report and Order*, it is being denied without discussion.

[4] Examples of non-display uses include transmission of video games, raw data (consumer or commercial), and computer software.

[5] *Report and Order* at paras. 9, 10, and 44.

Report and Order. Nevertheless, the Commission wishes to reiterate that in limiting teletext to essentially display purposes, it did not take a position on a more generalized authority that would permit other kinds of data signals on the vertical blanking interval (VBI).[6]

Remunerative Services by Public Broadcast Stations

4. In its petition, the University of Wisconsin System (UWS), the licensee of noncommercial station WHA-TV, requests that the Commission extend to public broadcasters the authority to operate "for profit" or remunerative services on the two text channels of the line 21 caption system.[7] UWS currently provides a full-time news, weather and public service announcement service for the hearing impaired on one channel and a farm/agribusiness service on the other. In support of its request, UWS submits that sponsorship income would help continue these services and facilitate their eventual transfer to teletext delivery.

5. PBS and the National Captioning Institute (NCI) indicate their support for the basic concept of UWS's proposal, which is that public broadcasters be allowed to operate remunerative services on the two line 21 system text channels. However, they disagree with UWS's suggestion that this policy be implemented through a change in the text of Section 73.682 of the Rules.[8] PBS offers the opinion that commercial services can be transmitted on the line 21 system by noncommercial stations under the

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[6] The Commission initiated a separate proceeding to consider authorization of data signals on the VBI in a *Notice of Proposed Rule Making,* adopted on February 15, 1984 (49 FR 10556, published March 21, 1984).

[7] In the *Notice,* the Commission had proposed to make line 21 of the VBI available for teletext on a general basis. This would have allowed all forms of teletext, including the current caption system, to be transmitted on line 21 and would have granted authority for public broadcasters to offer remunerative services on line 21 using either teletext technology or the existing caption system with its two text channels. After reviewing the record on this proposal, the Commission decided to withhold the general authorization of teletext on line 21 for a period of five years, after which it would reconsider its policy on this issue. The effect was to allow non-commercial broadcasters to operate remunerative services on teletext, but not on the text channels of the line 21 system.

[8] The modifications to Section 73.682 proposed by UWS are:

(1) In subparagraph (a)(22)(ii), delete the underscored:
(ii) At time when line 21 is not being used to transmit a program-related data signal, *data signals that are not program related may be transmitted, PROVIDED: The same data format is used and the information to be displayed is of a broadcast nature.*

(2) Replace with:
Teletext services authorized in Section 73.646(c) may be transmitted, provided the same data format is used.

existing rules.[9] PBS is concerned that the changes suggested by UWS would allow teletext on line 21. NCI shares this concern and emphasizes the view that the Commission should continue to preclude teletext from line 21. It suggests that the relief requested by UWS be provided through an interpretation of the rules that would simply state that Section 73.621(e) does not apply to use of line 21. In its reply, UWS acknowledges the statements of NCI and PBS and withdraws its petition to the extent that it sought to extend teletext authorization to line 21. It lets the petition stand in seeking clarification of the applicability of Section 73.621(e) to use of line 21 text facilities.

6. The Commission agrees with the petitioners that it would serve the public interest to allow public broadcasters to operate remunerative services on the text channels of the line 21 caption system. Such authority for public broadcasters would be consistent with the Commission's policy allowing them to use their teletext facilities on a remunerative basis as an alternative source of financing and would not be expected to inhibit or interfere with provision of non-commercial caption service.

7. The Commission does not wish to lend ambiguity to the rules in the sense that it might be providing a general authorization to use line 21 for teletext. Therefore it will not implement the change to Section 73.682 that was suggested by UWS in its original filing. Instead, the Commission is adding a new paragraph (g) to Section 73.621 to explicitly indicate authority to transmit non-program related signals on line 21 for remunerative activities. This new paragraph (g) is set forth in Appendix B.

Teletext as Ancillary Service — Sections 312(a)(7) and 315 of the Communications Act

8. In the *Report and Order,* the Commission concluded that, as a matter of law, Sections 312(a)(7) and 315 of the Act need not be applied to teletext. It further stated that because of teletext's unique characteristics as a print medium and an ancillary service of broadcasting, it believed application of these statutory provisions is both unnecessary and unwise as a matter of policy.

9. Two parties, *MAP and Geller* challenge the Commission's decision not to apply fairness and political broadcasting regulations to teletext services. MAP argues three points. It first charges that the Commission violated Section 553(c) of the Administrative Procedures Act (APA), 5 U.S.C. 553(c), in that it failed to mention or ask comment on the applicability of the equal opportunity, reasonable access, lowest unit rate charge and fairness doctrine requirements to teletext in the *Notice.* MAP

[9] PBS states that the only apparent reason for UWS's assumption that it cannot operate commercial services on line 21 is the restriction in Section 73.621(e) that generally prohibits public stations from providing commercial services.

then argues that the Commission incorrectly held that the law does not require the application of fairness/political broadcasting rules to teletext. Finally, MAP contends that the Commission failed to consider such rules as a matter of policy under the public interest standard. It requests that the Commission issue a new *Notice of Proposed Rulemaking* to provide opportunity for full public participation on this issue.

10. Geller agrees with the Commission that fairness/political broadcasting regulations should not be applied to teletext, but is of the opinion that the Commission's arguments supporting this policy are inadequate and that, in fact, it cannot legally exempt teletext service from such regulation. Geller suggests as an alternative approach that the Commission adopt a policy whereby it would not entertain complaints in these areas with respect to teletext, but instead would examine public interest issues in the context of license renewal and state that it would reexamine the need for new policies based on experience.

11. The NAB responds to MAP and Geller on this issue and defends the Commission's decision as procedurally correct, good law, and sound policy. In response to MAP's charge that the Commission gave inadequate notice of its intention not to apply fairness and political broadcasting obligations to teletext, the NAB points to paragraph 17 of the *Notice* and states that it is difficult to understand the contention that this was not adequate notice. The NAB further submits that the fact that eight parties, including MAP itself, addressed the issue suggests strongly that there was adequate notice.

12. The Commission disagrees with MAP's contention that it did not provide adequate notice on the issue of the applicability of the political broadcasting requirements and the Fairness Doctrine to teletext. As stated by the NAB, the fact that eight parties, including MAP itself, commented on this issue is clear indication that there was adequate notice. Accordingly, MAP's request that the Commission issue a new *Notice of Proposed Rule Making* to study this issue is being denied.

13. The issue of whether the law requires that political broadcasting and Fairness Doctrine requirements to be applied to teletext were fully considered by the Commission in the *Report and Order*.[10] Neither MAP nor Geller present any new facts in support of the position that political broadcasting and Fairness Doctrine obligations must be applied to teletext as a matter of law.[11] Rather, the arguments of both MAP and Geller merely repeat arguments that the Commission considered and rejected in its own analysis. Further, the question raised by MAP as to whether fairness and political broadcasting rules should be applied as a

[10] *Report and Order*, paragraphs 54-60.

[11] *Id.*, paragraphs 55-58.

matter of policy was decided in the *Report and Order.*[12] The approach suggested by Geller, whereby the Commission, as a matter of policy, would examine such issues only in the context of renewal, is similarly unwarranted in view of the Commission's decision on this matter. Accordingly, petitioners' requests for revisions to the Commission's teletext policy with respect to Sections 312(a) and 315 of the Act are being denied.

14. We think it is useful at this juncture, however, to more extensively discuss the nature and scope of our findings in this area to assure that petitioners and the public understand both the narrow scope of the issues involved here, and the basis upon which we make these findings. First, we dispute the contrary implications of some petitioners and reaffirm our intention to pursue continued enforcement of these content-related broadcast laws, policies and rules until and unless they are altered by ourselves or by other competent authority.[13] This, however, in no way alters or diminishes our authority and responsibility to interpret and apply these as necessary when novel questions and circumstances arise. This is particularly true as in this situation where new services are being authorized that could not or were not contemplated when Congress passed related statutory provisions nor when this Commission enacted rules and policies designed to give force to these provisions. Our attention is further focused in this area where the changing nature of the industry due both to competitive and technological flux requires us to give primary concern to the First Amendment implications of our actions. Second, we note that the question of content regulations as specified in Title III of the Communications Act and as elaborated in our rules and policies need only be addressed in what we reasonably expect will be a very narrow range of situations, *i.e.,* where television broadcasters will be offering teletext services in a manner that is closely related to traditional print media, and especially where teletext is used for the retransmission of media such as newspapers and magazines.[14] However, we note that to date this service has not yet gone beyond the early experimental stage and that many of those who have made experimental offering of this service have not yet

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[12] *Id.,* paragraph 54.

[13] *See* e.g. *Syracuse Peace Council,* FCC 84-___, adopted October 26, 1984; *Notice of Inquiry,* FCC 84-140, released May 8, 1984, paragraph 3.

[14] We need not address separately material transmitted by teletext that is clearly related to and substantially a part of a broadcast program, such as second language translation or captioning for the deaf. We assume that these special and limited transmissions will merely duplicate and enhance their associated broadcasts. Thus, any question of statutory content regulation for these transmissions can and would necessarily be fully contained within the ordinary resolution of such questions in the traditional broadcast context, and we find no need to apply additional and distinct treatment for the teletext transmission.

found a mix of offerings that appears clearly destined to find widespread consumer acceptance. Because no preferred mode of operation relative to our statutory regulatory schemes has emerged, we believe it is particularly important to be cautious at this stage so as not to make sweeping predictions and rigid regulatory decisions. In light of the apparent market difficulties of this emerging technology, we are reluctant to add unnecessary regulatory burdens where no showing of need for regulation yet exists.

15. Notwithstanding the preliminary nature of our findings, we think it is necessary and appropriate here to reaffirm our decision in the *Report and Order* to forbear from applying traditional broadcast content controls on broadcasters even when they offer teletext service in a broadcast mode. In this context we view our decision here as no way inconsistent with the court's views in *NAB v. FCC*, 740 F. 2d 1190 (D.C. Cir. 1984), for the reasons detailed below. We consider teletext clearly as an ancillary service not strictly related to the traditional broadcast mode of mass communication. First, the very definition of teletext confined the service to traditional print and textual data transmission. See para. 3, *supra*. Thus, although these data will be transmitted at some point through the use of the electromagnetic spectrum, its primary and overriding feature will be its historical and cultural connection to the print media, especially books, magazines and newspapers. Users of this medium will not be listening or viewing teletext in any traditional broadcasting sense, but instead will be *reading* it, and thus be able to skip, scan and select the desired material in ways that are incomparable to anything in the history of broadcasting and broadcast regulation.[15] In this light, we believe that the content regulations created for traditional broadcast operations are simply out of place in this new print-related textual data transmission medium. We decline to attribute to Congress an intent to extend broadcast content regulation, such as those contained in Section 315, to this new medium. Even if we were to assume that Congress intended for Section 315 to apply, that section imposes no new duties under our existing and longstanding rules enforcing that provision. For example, one threshold criterion for the application of Section 315 has been "use" by a candidate for public office. In general, this "use" criterion requires that in order for Section 315 to apply, a candidate's voice or picture must appear on the program or announcement in such a way that they will be identified by members of the audience. Such a "use" is not possible in the context of teletext, just as it would not be possible in

[15] We also note that functionally the electromagnetic transmission of these services can be compared with the state of the art in modern newspaper production where news is often gathered, edited and formatted in one location, and then sent by satellite to remote locations for printing and eventual delivery.

any of the traditional media consisting exclusively of text. Congress has been fully cognizant of our implementation rules in this area and we can reasonably assume their concurrence with our interpretations here.

16. Along the same lines, we note that affirmative access obligations, such as those contained in Section 312(a)(7) for federal political candidates, can be satisfied by the broadcaster over the main channel. Guided as we are in such matters by a reasonableness standard, we find that a broadcaster could satisfy the "reasonable access" rights of a candidate without use of teletext. Thus, whether or not Congress intended these provisions to apply to teletext, the duties they impose are met by main channel service anyway. This satisfaction of current Sections 315 and 312(a)(7) obligations by the main channel buttresses our conclusion that these content duties should not be extended to teletext.

17. In this regard, we are also guided by the paramount consideration given by this Commission, the Congress, and the Supreme Court to all issues related to the First Amendment, and the overriding intent of all these institutions to ensure that these fundamental freedoms are not unwarrantedly abridged. Our decision to forbear is driven by such concerns, and we take as our lead here the decision of the Supreme Court in *Miami Herald Publishing Co.* v. *Tornillo,* 481 U.S. 241, 1974, where the Court unanimously invalidated a Florida statute creating a right for candidates to equal space to reply to criticism in newspapers. The Florida right to reply is substantially equivalent to the law and policy we would be creating here if we applied Section 315 to teletext transmissions offered in a "broadcast" mode. As the Court found there, we find that neither the letter nor the purposes of the First Amendment would be served by such a ruling. Quite simply, this Commission would be required to intrude into the editorial judgments of teletext editors. "The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, the content, and treatment of public official — whether fair or unfair — constitutes the exercise of editorial control and judgement. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Id.* at 285. Given this clear statement of the Court, and the historical sensitivity of the Congress to these issues, we are unable to construe the intent of Congress to apply Section 315 and similar statutory provisions, and our associated rules and policies, to the teletext medium.[16]

[16] For instance, some of the current teletext operations involve newspaper publishers. Suppose a newspaper decided to deliver its service by teletext, as opposed to delivery of hard copy. We are reluctant at this juncture to change the First Amendment protection afforded the print medium because of this change in delivery mode, absent sufficient justification for less protection.

Regulatory Status of Teletext Services

18. As discussed in the *Report and Order,* the teletext authorization permits a wide range of service applications, many of which do not resemble traditional forms of broadcasting. The Commission recognized that some teletext activities could take on the characteristics of common carrier or private carrier services and therefore included provisions in the rules to regulate such services in an appropriate manner. Under the policies and rules the Commission set forth in the *Report and Order,* private carrier and common carrier services are subject to rules governing similar existing services.

19. The NAB petitions the Commission to reverse its decision on the regulatory status of non-broadcast related teletext and refrain from imposing common carrier status on any form of teletext service. It also requests that the Commission preempt state and local common carrier regulations that would otherwise apply to teletext.

20. The underlying thesis of the NAB's position is that to allow the form of teletext to determine its regulatory status will cause great confusion for service providers and needless delays in the initiation of teletext service. It argues that the Commission should not substitute common carrier regulation for market dynamics and that to impose such regulatory burdens is contrary to the entire purpose of authorizing teletext.

21. In support of its position, the NAB argues that common carrier regulation is inconsistent with teletext's ancillary status. First, it states the opinion that to impose common carrier status on some forms of teletext ignores the fact that a licensee has a responsibility to exercise control over everything transmitted over its channel, including the VBI. According to the NAB, under common carrier law the licensee would be prohibited from exercising the control necessary to fulfill this responsibility. The NAB further argues that common carrier status would contravene Section 3(h) of the Communications Act which states, in relevant part, that:

> "... but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. 3(h)

The NAB next contends that the Commission's policy of regulating teletext in accordance with the nature of the service and the manner in which it is offered increases both the cost and risk associated with developing some forms of teletext. The NAB states that it would be costly and difficult for stations to make initial determinations regarding service type under the *NARUC I* test and that good faith determinations that a

service was not common carriage would be subject to challenge.[17] Finally, the NAB indicates that the burdens imposed by state common carrier regulation are often worse than those of federal regulation and that in many cases state regulations effectively prevent new entries into a common carrier field.

22. The Commission is not persuaded by the arguments presented by the NAB that it should alter its decision with respect to regulation of non-broadcast related teletext service. The rules and polices pertaining to non-broadcast related teletext were formulated to provide a fair and equitable system for regulating teletext services that are similar to services provided by regular private and common carrier licensees. If, for some reason, the Commission were to modify the regulations applicable to a particular service, then such changes would automatically apply to teletext services operating under the authority of that service.

23. The Commission sees no reason why application of the *NARUC I* test should prove more burdensome to a teletext operator than to an applicant or licensee in some other private or common carrier service. Nor is there reason to believe teletext operators will experience undue or inordinate delays in the initiation of service as a result of the application process for authority to operate as a common carrier.[18]

24. The Commission disagrees with the NAB's argument that common carrier regulation is inconsistent with teletext's ancillary status. In the role of a private or common carrier providing access to teletext transmission facilities, the licensee is responsible for ensuring that its operation conforms to technical operating requirements and the rules applicable to the particular service being provided. The broadcaster would not be expected to monitor or otherwise supervise the content of the teletext transmissions beyond that required by the rules of the service offered. With regard to NAB's contention that common carrier status would contravene Section 3(h) of the Act, that section was intended only to prevent the Commission from imposing common carrier-type regulatory obligation in situations where a licensee is authorized, and wishes, to maintain editorial control over programming transmissions. It does not prevent the Commission from imposing obligations where a licensee elects voluntarily to operate as a common carrier rather than retain control over the content of transmissions, as would be the case here. *See generally CBS v. DNC,* 412 U.S. 945 (1973).

25. In summary, the Commission finds that the NAB has not demonstrated any manifest error or omission in the decision with respect

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[17] *See, National Association of Regulatory Utility Commissioners* v. *F.C.C.,* 525 F. 2d 630 (D.C. Cir. 1976), *cert. denied,* 425 U.S. 922 (1976).

[18] Private carrier services require only a letter notifying the Commission prior to initiation of service.

to the federal regulatory status and treatment of non-broadcast related teletext activities, nor has it presented any new information on this issue which was not available to it, or the Commission, during the course of the comment and deliberative phases of this proceeding.[19] Accordingly, the Commission will deny the NAB's request to alter its policy towards the federal regulatory status of non-broadcast related teletext.

26. With regard to the preemption issue, the Commission ruled on the NAB's request to preempt state regulation of common carrier teletext services in a *Memorandum Opinion and Order* adopted April 26, 1984 (49 FR 19659) in the FM subcarrier proceeding, BC Docket 82-536.[20] In this decision, the Commission determined that state regulation that has the effect of prohibiting or impeding entry of common carrier services provided through teletext, FM subcarrier, and TV aural baseband subcarrier facilities frustrates its federal objectives in authorizing these services and making this spectrum available for new uses and therefore should be preempted.[21] The preemption of state authority is limited to regulation that affects entry. In this regard the Commission stated that "other than the preemption of entry regulation, we intend no change in the existing division of regulatory authority between the Commission and the states."[22]

Cable Carriage of Teletext

27. Fourteen parties, primarily representatives of the broadcast industry, request that the Commission reverse its policy on cable carriage

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[19] We recognize, of course, that the United States Court of Appeals has remanded for further consideration some related aspects of the Commission decisions in the *DBS Report and Order*, 90 F.C.C. 2d 676 (1982) and the *G.T.E. Satellite Corp.*, 90 F.C.C. 2d 1009 (1983). *See: National Association of Broadcaster vs. F.C.C.*, 740 F. 2d 1190 (D.C. Cir., 1984); *United States Satellite Broadcasting vs. F.C.C.*, 740 F. 2d 1147 (D.C. Cir., 1984). As discussed above, our legal and policy determinations here rest primarily on the print-related characteristics of the teletext medium, grounds that are independent of the issues addressed in those cases.

[20] The preemption issues raised in the FM subcarrier, teletext, and TV aural subchannel (Docket No. 21323) proceedings were all substantially identical. The Commission therefore chose to resolve the preemption issues in each of these separate proceedings with a single decision. In making this decision, the Commission fully considered all of the comments and other filings that were submitted in each of the three proceedings. *See*, FM Subcarrier *Memorandum Opinion and Order, supra*, Footnote 6. On reconsideration of the FM Subcarrier *Memorandum Opinion and Order, supra*, we concluded that the public had been afforded adequate notice that we might decide to preempt state entry regulation. *See, Memorandum Opinion and Order* in BC Docket No. 82-536, adopted November 8, 1984, ___ FR ___. We also note that on reconsideration in this proceeding NAB requested that we preempt state regulation. Thus, as in our FM Subcarrier proceeding, interested parties have had an opportunity to address the preemption issue.

[21] FM subcarrier *Memorandum Opinion and Order, supra.*, paragraph 17.

[22] *Id.*, footnote 24.

of teletext and either require carriage of all teletext or, in the alternative, adopt a "no-strip" rule.[23] The petitioners base their requests largely on the grounds that the Commission misunderstood important facts concerning this issue in relation to technical matters and that the Commission may not have fully appreciated the effect of its decision on the future of teletext service.

28. Many of the petitioners believe that the Commission based its decision on a concern that retransmission of teletext might pose serious technical problems for some cable systems and that the modifications to technical facilities necessary to overcome these problems would impose significant costs on cable operators. They argue that in fact few, if any, cable systems would have to upgrade their systems to carry teletext. Several proponents of mandatory carriage also disagree with the Commission's position that teletext is not analogous to the kinds of service that have traditionally been accorded mandatory carriage status. In a statement that is expressive of the general consensus of the petitioners, CBS argues that teletext services are enhancements of existing retransmitted broadcast services and as such contain material directed to the needs and interests of all viewers in a broadcaster's service area, especially material such as captioning and superimposed text that is directly related to the accompanying program material.

29. PBS and Community Telecasters of Southern California (CTSC) are concerned that if cable systems do not carry teletext, it will result in substantial economic harm to public broadcasting stations. Finally, a number of parties believe that the Commission's decision on the cable carriage issue was influenced by a belief that cable systems would be obligated to retransmit program-related teletext under the requirements of the Copyright Act. The consensus of the petitioners on this point is that copyright protection is not adequate to protect the public interest objectives of the mandatory carriage rules and that the Commission should not ignore its responsibility to protect teletext service by deferring to copyright law.

30. Four parties filed oppositions to the requests for reconsideration on the cable carriage issue. On the technical issue, cable operators concede that a modern, well-designed, and properly maintained cable system should have little problem with either on-channel or adjacent-channel interference from teletext transmitted by broadcasters. However,

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[23] As as alternative to mandatory carriage rules that require a cable operator to ensure the technical quality of the retransmitted teletext signals, PBS suggests that the Commission adopt a simple "no-strip" rule. It states that this option would resolve the concerns of the cable industry for technical problems, and the expense of plant modifications necessary to overcome them, by not requiring cable systems to take any affirmative action to carry broadcasters' teletext.

they maintain that there are likely to be situations where some technical problems will occur.

31. Opponents of mandatory carriage argue in support of the position that teletext is not subject to the public interest rules and requirements that have provided the basis for the must carry rules. They also refute petitioners' statements regarding the economic consequences of allowing cable systems to delete broadcasters' teletext and provide examples of situations where retransmitting teletext could pose technical problems. Southern Satellite Systems (SSS) counters broadcaster claims that copyright law is not adequate to protect program-related teletext and believes that these issues can best be resolved through negotiations between the parties.

32. Finally, NCTA submits that those petitioners who propose a simple no-strip rule misunderstand the problem. NCTA states that the usability of a signal, specifically the undesirability of retransmitting a poor signal, is the very reason a cable operator would delete the signal. It argues that any form of mandatory carriage rule could unnecessarily subject a cable operator to service calls and subscriber dissatisfaction and force it to offer an inferior or unusable product.

33. The technical information presented by parties on both sides of the must carry issue establishes that, with some exceptions, most well maintained cable systems would not experience either on-channel or adjacent-channel interference in retransmitting teletext signals. The Commission however did not base its decision, as some petitioners believe, on the expectation that retransmission of teletext would pose serious technical problems for cable systems. While this subject was discussed in the course of the Commission's deliberations, the Commission's primary consideration is whether teletext services merit mandatory carriage protection under the public interest standards that it has traditionally applied in such matters. Upon examination of the petitioners' statements in light of these standards, the Commission concludes that they have not made the requisite showing for grant of their requests either to require carriage of all teletext signals, or alternatively, to adopt a "no-strip" rule for all teletext signals. The petitioners' present no new information or evidence to alter our initial determination that teletext services in general are not analogous to the types of services that have traditionally been accorded must carry status.[24]

34. While we reject the petitioners' request for must carry status for all teletext signals, the Commission is aware of the arguments raised by the petitioners for a limited requirement for carriage of teletext signals such as captioning and text services that are related to the main television program service. The Commission notes that it has recognized a similar

[24] *Report and Order,* para. 88.

distinction between program enhancements and other uses of ancillary facilities in its consideration of must carry protection for TV aural baseband subcarriers. In the *Second Report and Order* in Docket No. 21323, 49 FR 18100, the Commission indicated that it was conscious of the arguments raised by some parties regarding the need for must carry regulation to protect TV aural subcarrier signals used for program-related purposes such as stereophonic sound and second language service.[25] However, the Commission stated that it needed additional information before deciding on must carry status for TV aural subcarriers. It therefore issued a second *Further Notice of Proposed Rule Making* in Docket No. 21323 on July 26, 1984 (49 FR 32619) to further examine this one issue.

35. The Commission considers the record in the teletext proceeding to be sufficient to support a decision on must carry status for program-related teletext and thus does not intend to seek additional comment and information from the public on this question. However, in view of the similar natures of the must carry issues for program-related aural subcarriers and teletext, the Commission believes it would be appropriate to resolve both matters at the same time. Accordingly, the Commission is postponing action on the reconsideration of must carry status for teletext that is directly related to normal television service until it takes final action on the must carry issue for program-related TV aural subcarriers.

Effective Date of the Teletext Rules

36. The Commission specified that the teletext rules would be effective upon adoption of the *Report and Order,* rather than the usual effective date of thirty days after the decision is published in the *Federal Register.* There was, however, an error in the *Report and Order* that was released on May 20, 1983, in that the stated effective date of June 27, 1983 did not agree with the discussion in the text, at paragraph 90, that the rules would be made effective upon their adoption. An *Erratum* to correct this mistake and make the effective date March 31, 1983 was issued on June 2, 1983.

37. The Media Access Project (MAP) asserts that the Commission's action on this point violated Section 553(d) of the Administrative Procedures Act (APA), 5 U.S.C. 553(d), and requests it to take appropriate corrective action. MAP argues that the Commission, by issuing the

[25] In regard to non-program related teletext material, we believe it appropriate to note that the absence of a must-carry obligation should not be read to approve stripping of broadcast teletext signals by cable operators in an instance which would constitute anti-competitive conduct. Were an actual case of deliberate anti-competitive conduct to be brought before the Commission, we would consider the appropriate remedies at that time. Our goal is to ensure that the development of teletext technology is not unreasonably inhibited.

Erratum, made the rules effective almost two months prior to their publication. It further states the Commission failed to offer any reasons why any of the exceptions to Section 553(d) should apply.[26]

38. The Commission acknowledges that the error concerning the effective date of the rules was unfortunate and may have produced some degree of confusion and uncertainty for the industry and other parties with an interest in the teletext proceeding. However, in view of the absence of any specific complaints of adversity concerning the effective date of the rules, it appears that this mistake has not resulted in any serious or significant harm to any party.

39. As discussed in paragraph 90 *supra,* and paragraph 90 of the *Report and Order,* the Commission believes that to permit stations to shift their teletext operations to production mode at the time the *Report and Order* was adopted was consistent with furthering the development of services that it found to be in the public interest. Therefore, the Commission holds that this objective constitutes the good cause provided for under exception (3) to Section 553(d). In addition, because the rules authorizing teletext relieve a restriction upon licensees, the 30 day effective date provision of the APA is not applicable. *See* U.S.C. 553(d)(1).

40. Accordingly, the Commission concludes that while there were minor procedural discrepancies associated with the effective date of the rules, these mistakes were not significant and no corrective action is warranted.

41. Accordingly, IT IS ORDERED, that the petitions for reconsideration of the *Report and Order* filed by parties named herein ARE GRANTED to the extent indicated above, and ARE DENIED in all other respects. In addition, IT IS ORDERED that Part 73 of the Commission's Rules ARE AMENDED as set forth in Appendix B, effective March 4, 1985.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

*Appendix A-may be seen in FCC Dockets Branch, 1919 M Street, N.W., Washington, D.C.

[26] Section 553(d) of the Administrative Procedures Act states:

> "The required publication or service of a substantive rule shall not be made less than 30 days before its effective date, except: 1) a substantive rule which grants or recognizes an exemption or relieves a restriction; 2) interpretative rules and statements of policy; or 3) as otherwise provided by the agency for good cause found and published with the rule.

Appendix B

Chapter I of Title 47 of the Code of Federal Regulations is amended and revised as set forth below.

1. Section 73.621 is amended by adding new paragraph (g) to read as follows:

Section 73.621

* * * * *

(g) Non-program related data signals transmitted on Line 21 pursuant to Section 73.682(a)(22)(ii) may be used for remunerative purposes.

Control, Transfer of, Situations Defining

Actions taken by the Board of a licensee corporation, including issuing new securities limiting debt and amending by-laws to eliminate the right of share-holders to call special meetings, found to be the exercise of existing control, not a transfer of control under §301(d) of the Act.

—*Turner B/cing System, Inc.*

FCC 85-424

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Petition of

Turner Broadcasting System, Inc.

For Declaratory Ruling

MEMORANDUM OPINION AND ORDER

Adopted: July 30, 1985; Released: July 30, 1985

BY THE COMMISSION: COMMISSIONER RIVERA NOT PARTICIPATING.

1. We here consider a petition filed July 5, 1985, by Turner Broadcasting System, Inc. (Turner), requesting a ruling that certain actions taken or contemplated by CBS Inc. (CBS), constitute a transfer of control requiring prior Commission approval under section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C.A. §310(d)(1984). We also consider CBS' opposition to the petition dated July 15, 1985, and Turner's reply of July 22, 1985.

2. Turner filed a long-form application seeking Commission consent to a transfer of control of CBS to Turner, which is now pending before the agency. CBS and others have filed petitions to deny and informal objections against that application. In addition, CBS has taken steps that, in its words, "would make more difficult, and may prevent, consummation of the [Turner] offer." CBS Offer to Purchase, July 3, 1985, p. 4. For reasons that follow, Turner maintains that the steps taken, in the aggregate, constitute a transfer of control of CBS requiring prior Commission consent.

Summary of Pleadings

3. Turner alleges that the first step occurred in March, 1985, when CBS retired its existing long-term credit arrangements and obtained a new line of credit calling for the acceleration of the payment of the outstanding debt if the majority of CBS Board were to be replaced within a short period of time. Thus, if Turner is successful in his efforts to gain control of CBS, and he thereafter elected his own slate of directors, the debt would be due and new credit would have to be arranged. The second step to which Turner refers is CBS' action amending its by-laws so that its shareholders can no longer call special meetings, which formerly could be called by a vote of ten percent of CBS's shareholders. Only annual meetings will be held. Turner filed suit to rescind this by-law amendment, and the matter is now pending before the Federal District Court. *Turner Broadcasting System, Inc. v. CBS, Inc.*, Civil Action No. C-85-2617A (N.D. Ga.). If Turner's tender offer is ultimately successful, the effect of the amendment would be the possibility of a long wait until the next annual meeting, delaying the election of Turner's slate of Directors.

4. The third step, which is by far the most complex, is CBS' offer to purchase and retire 21 percent of its outstanding shares. There are three subparts of this third step that are relevant to this proceeding. These are: the terms of the offer to purchase the shares; the issuance of a new class of preferred voting shares to five institutional investors; and certain provisions as to the sale of CBS shares by Mr. William Paley, founder of CBS. Because there is some dispute in the pleadings as to how these matters should be characterized, the description recited below is based upon our own reading of the July 3 CBS Offer to Purchase.

5. Under the terms of the offer, CBS shareholders may exchange each share they own for a package of $40 in cash and a $110, 10.875-percent senior note ("the Notes") due in 1995. The Notes impose certain obligations on CBS, including a prohibition on placing additional liens on CBS' property, unless such secured debt is five percent or less of the corporation's "consolidated adjusted book capitalization," and unless the Notes are secured on the same basis as the new debt. Sales and leasebacks of company property, such as contemplated by Turner, are also prohibited. Moreover, the ratio of CBS' consolidated debt to adjusted book capitalization cannot exceed 0.7 to 1.0, and the ratio of consolidated earnings to fixed charges cannot exceed two to one. Transfers or sales of CBS properties will be permitted, but if CBS should sell its radio stations and its Philadelphia television station, as proposed by Turner if it acquires control, the proceeds of any such sale must be placed in an irrevocable

trust as security for the holders of the Notes.[1] In the event of a default on the interest payments on the Notes, 25 percent or more of the Note holders may declare the principal amount due and payable immediately. If any of the terms of the Notes are not performed by CBS, the Note holders are empowered to seek specific performance in any court of competent jurisdiction.

6. The purchase of the shares will be financed in part by borrowing and in part by the sale to five institutional investors of a new class of voting, convertible, preferred shares. These shares are valued at $100 each and will pay a ten-percent dividend. The investors will vote together as a class and will have one vote per share. However, in the event of default on dividend payments, the preferred shareholders will be able to elect, as a class, 20 percent of the corporation's Board members, and will be able to bar, by an 85 percent vote of the class of stock, the issuance of any new security having a priority over the preferred shares or the approval of any amendments of CBS' Certificate of Incorporation adversely affecting the rights, preferences or limitations associated with the new, preferred shares. Further, the provisions of the offer of the preferred shares limit the ratio of CBS' debt to adjusted book capitalization to no more than 0.75 to 1.0. (In its pleading, CBS states that under this limit the debt-to-equity ratio works out to three to one.) The holders of the preferred shares have the right to enforce these provisions by obtaining injunctive relief in court.

7. Mr. Paley and entities and persons related to him have agreed not to submit their shares for cash and the Notes. Through August 1, 1987 however, he has the option of selling up to 434,489 of his shares to CBS for $150 per share. The agreement further provides that if he sells any such shares prior to the expiration of the option, any amount in excess of $150 per share must be paid over to CBS. Thus, Mr. Paley would have little incentive to sell his shares to any other party offering more than $150 per share, because the excess enures to CBS, not Mr. Paley.[2]

8. Turner notes that the Act does not define "control," that no exact formula for defining control can be used due to widely varied facts, and that case-by-case determinations are made in determining whether a transfer of control has or has not occurred. In Turner's opinion, the actions described above, made "without shareholder input or ratification," demonstrate "an acquisition of control by the Board rather than an

[1] The buyer would first be required to prosecute a waiver of our duopoly and one-to-a-market rules, sections 73.3555(a) and (b), if any action occurs that would eliminate CBS' grandfathered ownership interests. Turner's acquisition of control of CBS, in the absence of a waiver, would eliminate the grandfathered status of CBS' holdings of radio and television stations in the same market and the Grade B overlap of its New York City and Philadelphia television stations.

[2] Turner values its offer in excess of $150 per share.

exercise of shareholder-delegated authority." It views the ability of the preferred shareholders to exercise a veto power, in the limited circumstances described above, as evidence that CBS' "Board will have succeeded in insulating itself from control or even influence by its shareholders . . . ." Turner states that the Commission has found transfers in similar cases, citing, for example, *Bartell Broadcasters, Inc.*, 19 F.C.C.2d 890 (1969). It also quotes portions of our decision in *Committee for Full Value of Storer Communications, Inc.*, 57 R.R.2d 1651, *aff'd sub nom., Storer Communications, Inc. v. F.C.C.*, 58 R.R.2d 244 (D.C. Cir. 1985), where we stated, based on the facts presented, that Storer's shareholders would "retain the power to call a special meeting at any time with twenty-five percent shareholder vote and they retain the power to approve or disapprove major corporate actions — including the decision to sell all or substantially all of the corporate assets or to liquidate the company." 57 R.R.2d at 1659.

9. In contrast, Turner alleges that CBS shareholders can no longer call special meetings and the sale of all or substantially all of CBS' assets is "foreclosed as a practical matter." Turner also contends that the ability to direct the company's operations and to determine the composition of the Board are relevant factors in determining where control is located, citing *Metromedia, Inc.*, 98 F.C.C.2d 300, 306, *recon. denied*, 56 R.R.2d 1198 (1984), *appeal docketed sub nom. California Association for the Physically Handicapped v. F.C.C.*, No. 84-1170 (D.C. Cir. filed May 4, 1984). In the CBS case, Turner asserts, CBS shareholders or an outsider will not be able to acquire the power to direct the company's operations or determine the composition of the Board as a result of the Board's recent actions or proposals. It further contends that plans to recapitalize licensee corporations have required prior Commission approval, citing a staff action of June 20, 1985, involving Multimedia, Inc. Finally, Turner states that section 310(d) of the Act requires prior Commission approval of a transfer of an FCC-issued license, and to "any rights under" that license. Such rights have been transferred here, in Turner's view.

10. As a separate public interest factor, Turner states that the Commission has been deregulating broadcasting on the ground that often "competition is a substitute for regulation." Turner alleges that this policy will be thwarted if CBS management is allowed to insulate itself from shareholder and market scrutiny. Finally, Turner urges that Commission review of the transaction is appropriate so as to determine whether the new, preferred shareholders are passive investors for the purposes of the multiple ownership rules. If not, Turner alleges, the holdings of three of the institutional investors buying the preferred shares, coupled with their existing media holdings, may violate section 73.3555 of the Commission's Rules, the multiple ownership rule.

11. CBS, in opposition, does not believe that any transfer of control, within the meaning of section 310(d), will occur. It states that the only transactions that will be precluded are those that raise the debt-to-total-capitalization ratio to "imprudent" levels. CBS believes that this limitation, which applies regardless of whether the Turner effort succeeds or not, is a reasonable limitation on indebtedness designed to protect the company and its shareholders against excessive debt, and to protect investors, whose claims might be subordinate to subsequent lendors in the event the corporation were to be liquidated. As to the reasonableness of the limitations, CBS observes that the debt-to-total-capitalization ratio of 0.75 to 1.0 is more liberal than recently retired CBS corporate notes, which specified a ratio of 0.5 to 1.0. CBS alleges that similar restrictions are common in debt instruments and, in fact, points to the terms of a line of credit extended to Turner that specifies a debt-to-equity ratio of 0.8 to 1.0. CBS states that the Turner loan, as well as CBS' Notes, restrict total debt, asset sales and the ratio of cash flow-to-fixed charges.[3] CBS concedes that in its present form, Turner's plan to acquire CBS may be barred by CBS' recapitalization plan. CBS states, however, that its plan does not prohibit Turner or anyone else from acquiring the corporation. Turner "need only sweeten its offer to include a significant cash component to overcome the recapitalization restrictions."

12. CBS also states that the Commission has previously reviewed various restrictions, some more severe than those found in this case, and ruled that such terms did not constitute a transfer of control under section 310(d) of the Act, citing, among others, *News International, PLC*, 97 F.C.C.2d 349, 351 (1984), and *Data Transmission Co.*, 44 F.C.C.2d 935, 936 (1975).

13. In its reply pleading, Turner states that review of individual, specific provisions in prior cases is not dispositive. Case-by-case determinations are required, and the totality of the circumstances presented by CBS' actions represent a transfer of control. Further, Turner alleges that no covenant passed on by the Commission in its past rulings is similar to the provision requiring CBS to seek a waiver of various multiple ownership rules in the event of a transfer of control to a new party, and placing the proceeds in trust. This covenant according to Turner, places an "impossible" condition on Turner that has nothing to do with the security of the holders of the Notes.

Discussion

14. With this summary of the facts and arguments in mind, we turn to the disposition of the pleadings. Section 310(d) of the Act provides in part:

[3] CBS has provided portions of this loan agreement, dated June 29, 1984, between Turner and four bank or trust companies.

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

As Turner correctly observes, there is no definition of "control" in the Act, and we have made case-by-case determinations as to what circumstances require our prior approval under section 310(d). *See, e.g., News International, PLC*, 97 F.C.C.2d at 355-58. The Commission there quoted from *WHDH, Inc.*, 17 F.C.C.2d 856, 863 (1969) (emphasis added) for general guidance: "[A] realistic definition of the word 'control' includes any act which vests in a *new* entity or individual the right to determine the manner or means of operating the licensee and determining the policy that the licensee will pursue." We have expressly held that reasonable restrictions designed to protect investors or lenders do not constitute a transfer of control by themselves. *Data Transmission Co.*, 44 F.C.C.2d at 936-37; *News International*, 97 F.C.C.2d at 357-58.

15. First, we note that it is not within our purview to decide whether the steps questioned by Turner exceed the authority of CBS' Board or are otherwise illegal under laws other than the Communications Act. Those questions are presumably before the U.S. District Court. The sole question before us is whether the actions taken constitute a transfer of control within the meaning of section 310(d). We find that if the Board acted within its authority, and we assume that it did for the purposes of this ruling, then it merely exercised the authority granted to it by the corporation's by-laws, charter and, ultimately, by the shareholders themselves, and the exercise of this existing authority is not a transfer of control. This point is underscored by the fact that the shareholders may withdraw the authority of the Board under which these actions have taken place. On the other hand, if the court finds that the Board exceeded its authority or otherwise acted improperly, then those actions presumably would be set aside.

16. As Turner correctly observes, we must look at all the circumstances presented, and we cannot restrict our review to a serial consideration of individual factors. To put CBS' actions into context, it is important to note that the 21 percent of CBS shares involved here are being retired, not transferred to another party. The retirement of the shares is not a movement of stock affecting control, when the remaining shares, as here, are widely held. The issuance of the new, preferred shares, which have one vote per share, will dilute the remaining 79 percent of CBS' shares by

about five percent.[4] Further, no changes in the officers and Directors are contemplated, so no question of a transfer arises on that point. *Cf. Storer Communications, Inc. v. F.C.C.*, 58 R.R.2d 244 (D.C. Cir. 1985) (court upholds a Commission finding that an abrupt change in the entire Board of Directors of a licensee corporation constitutes a transfer of control cognizable under section 310(d) of the Act, although insubstantial). As a general matter, an option to buy shares does not enter into transfer-of-control determinations until the option is excercised. *Standard Corporation*, 87 F.C.C.2d 604, 608 (1981). In this case, Mr. Paley has been offered an option to sell a portion of his shares. Even though the terms of his option provide a disincentive for him to sell to entities such as Turner that might offer a higher price per share, we do not believe that an unexercised option to sell those shares amounting to about 1.4 percent of the outstanding shares constitutes a transfer of control of an interest from the shareholders to the Board of CBS. Thus, these elements of control, which we have traditionally considered in transfer cases, are absent here.

17. Given our view of these actions, we do not believe that the cases cited by Turner compel a finding of a transfer of control in this case. The brief portions of *Lorain Journal Co. v. F.C.C.*, 351 F.2d 824 (D.C. Cir. 1965) and *Metromedia Inc.*, 98 F.C.C.2d at 306, which Turner quotes, must be put in the context of all the circumstances presented in those cases, which involved many significant factors not found in the case now before us. In *Lorain Journal*, the Commission had found that the group ostensibly in control of the licensee had abandoned control to another group without our prior approval. *Bartell Broadcasters, Inc.*, 19 F.C.C.2d 890 (1969), similarly involved the abandonment of control by those supposedly in control, and the assumption of control by persons we had not passed upon. In *Metromedia*, we recognized that the ability to direct corporate operations and to determine the composition of the Board were important elements in determining where control was located in that case. In contrast, however, we do not find that there has been a change in the persons who had the power to direct CBS' operations or determine the composition of its Board in the case before us. CBS' shareholders can still elect Board members and they can still consider tender offers, including Turner's, if the limits on CBS' debt are met. In *Committee for Full Value*

[4] CBS proposes to retire 6,365,000 of its shares, representing 21 percent of the shares issued. Thus, the total number of shares outstanding now is about 30,309,524. Subtracting the number of shares to be retired, and adding the 1,250,000 new, voting preferred shares, would give a total of 24,694,524 outstanding, voting shares after the transaction is completed. The new, preferred shares therefore represent about five percent of the total voting stock issued. As noted, these shares will be divided among five institutional investors. Because each institutional investor falls under the five-percent benchmark used in administering the multiple ownership rule, Turner's concerns as to a possible violation of that rule are not warranted.

of Storer Communications, Inc., 57 R.R.2d at 1659, the Commission noted the shareholders' right to call for special meetings upon a 25 percent vote of shareholders. That was but one factor in the case and, in any event, was in the discussion as to why the transfer should not be considered "substantial" under section 309(c)(2)(B) of the Act. That fact was not relied upon for a determination as to whether a transfer of control had occurred. The staff action concerning Multimedia, Inc.,[5] involved the passage of the corporation's licenses through a holding company that was under substantially the same control as the former licensee. Such reorganizations are properly brought to us under section 73.3541(d)(4) and (5) of our Rules. There is no comparable movement of licenses in the CBS recapitalization plan. Finally, when section 310(d) refers to a transfer of control of a license or "any rights thereunder," the "rights" referred to go to the ownership and operation of licensed stations. We do not believe that the covenants involved here, pertaining to the terms of notes or loans, are "rights" subject to our approval under section 310(d).

18. Turner is correct in noting that we have turned more and more to marketplace regulation in place of Commission-imposed regulations. We also agree that we should not permit our processes to be used to protect incumbent management or aid corporate challengers. The matters raised by Turner as to CBS' corporate affairs do not involve our processes. Instead, Turner's petition is primarily directed against matters designed to take advantage of actions CBS' Board believes to be available to them under state corporation laws and federal securities laws. The effect of those actions may be to provide a greater degree of insulation for the incumbents than was previously available. Intervention in such matters would involve us in a morass of corporate financing decisions and other corporate matters where the burden from our intrusion would be far outweighed by any conceivable public interest benefit. As indicated above, challenges to those kinds of actions will have to be reviewed, if at all, by the courts or by other administrative agencies dealing directly with corporate affairs.

Conclusion

19. We have carefully reviewed the cumulative effect of the actions taken or proposed by CBS. We are unable to find that CBS'shareholders have lost any rights such that a new group "will be able to determine the manner or means of operating [CBS] and determining the policy that the licensee will pursue." *WHDH, Inc.*, 17 F.C.C.2d at 863. The actions of CBS' Board simply do not affect "control" as that term was intended to be

[5] Letter of June 20, 1985, from the Chief, Video Services Division, Mass Media Bureau, to JJ Partnership, concerning BTCCT-850523KQ *et seq.*

used in the context of Commission regulatory activities. Indeed, they may be correctly viewed, as noted above, as a manifestation of shareholder control delegated to the CBS' Board of Directors.

20. Accordingly, the request for a ruling that the various activities of CBS Inc., constitute a transfer of control within the meaning of section 310(d) of the Act, filed by Turner Broadcasting System, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Frequency Allocation, Interservice Sharing
Frequency Allocation, Table of Frequency Allocations
Frequency Assignment
Land Mobile Services Frequency Allocation
Rule Making Proceeding
UHF Assignment

Notice of Proposed Rulemaking proposes revision of Part 2 of the Rules to provide additional UHF TV Channels for Land Mobile Sharing.
—UHF TV Band
Gen. Docket No. 85-172

FCC 85-289

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Further sharing of the UHF Television Band by Private Land Mobile Radio services	General Docket No. 85-172 RM-3975 RM-4829

NOTICE OF PROPOSED RULEMAKING

Adopted: May 31, 1985; Released: June 10, 1985

BY THE COMMISSION: COMMISSIONERS QUELLO AND RIVERA ISSUING SEPARATE STATEMENTS.

Introduction

1. In recognition of the Commission's responsibility to promote the most efficient use possible of the limited spectrum resource, and in order to accommodate some of the identified communications needs of the private land mobile radio services through the 1990's, we are commencing a proceeding with this *Notice of Proposed Rulemaking* to provide for further sharing between the private land mobile services and the UHF television broadcast service. This proposal would make additional spectrum available to land mobile services where most required, with minimal impact on TV broadcast service.

Background

2. The private land mobile radio services represent the largest group of licensed radio users regulated by the Commission. These services provide for the communications needs of a broad community of users, from police departments to small businesses. The expanding use of mobile communications since the 1960's has led to increased demands for, and congestion in, the private land mobile frequency bands, particularly in the nation's largest metropolitan centers.

3. On January 13, 1982, the Commission adopted a *Notice of Inquiry* in PR Docket No. 82-10 to examine the future trends and requirements of the Private Land Mobile Radio Services (PLMRS) and the land mobile user community. A staff report entitled *Future Private Land Mobile Telecommunications Requirements* (hereinafter the *Future Requirements Report*) was included in that docket in August 1983 and concluded that private land mobile radio services will experience substantial growth through the remainder of the century, resulting in a need for significant additional communications capacity.[1] Additionally, in October 1983, the Commission's Office of Science and Technology released a report entitled *Analysis of Technical Possibilities for Further Sharing of the UHF Television Band by the Land Mobile Services in the Top Ten Land Mobile Markets* (hereinafter *Further Sharing Report*).[2] This report showed that sharing opportunities vary from market to market, depending on the selection and size of the land mobile operating area in each market, the existing TV broadcast stations, and the protection criteria for sharing land mobile with broadcast services.

4. The *Future Requirements Report* suggested a combination of more efficient technologies and additional spectrum allocations as the best means available for providing the relief needed in these services. The report concluded that considering some implementation of new narrowband technologies, and assuming an additional spectrum release from the land mobile reserve in the 900 MHz band,[3] the private land mobile radio services would suffer serious shortfalls of communications capacity by the year 1990 in a number of major urban areas. For example, assuming

[1] "Future Private Land Mobile Telecommunications Requirements": Final Report, Planning Staff, Private Radio Bureau, FCC, Washington, D. C., August 1983. This study examined the future spectrum needs of the following major urban areas: Atlanta, Baltimore/Washington, Boston, Chicago, Cleveland/Detroit, Dallas, Denver, Houston, Kansas City, Los Angeles/San Diego, Miami, Minneapolis/St. Paul, New Orleans, New York, Philadelphia, Phoenix, Pittsburgh, St. Louis, San Francisco, Seattle, and Tampa/St. Petersburg.

[2] "Analysis of Technical Possibilities for Further Sharing of the UHF Television Band by the Land Mobile Services in the Top Ten Land Mobile areas." FCC/OST R83-3, October 1983.

[3] For simplicity we will refer to the spectrum between 806-947 MHz as the 900 MHz band.

that 17 megahertz of the reserve spectrum was released for private land mobile use and that narrowband technologies were developed on interstitial channels in the existing 150-170 MHz band, the report projected shortfalls from 3 to 109 megahertz in the top markets by the year 1990.[4] A petition filed by the Land Mobile Communications Council (LMCC) provided information that agreed with the *Future Requirements Report* findings concerning projected spectrum shortfalls.[5] Another petition filed by LMCC proposed further sharing of UHF TV channels 14-69 as a solution of the projected shortfall.[6] Likewise, a petition filed earlier by the Los Angeles County Sheriff's Department proposed that further sharing of TV Channels 14-20 be allowed in major metropolitan areas.[7]

5. The *Further Sharing Report* examined land mobile sharing of UHF TV broadcast channels in Boston, Chicago, Dallas-Ft. Worth, Detroit, Houston, Los Angeles, New York, Philadelphia, San Francisco and Washington, D.C. The report indicated that with no changes to the interservice sharing criteria currently governing land mobile sharing of the UHF TV band, possible additional sharing would not significantly contribute to satisfying the projected land mobile requirements.[8] However, with some changes to these rules, at least one TV channel in all the major cities except Detroit was considered available for land mobile sharing.

6. While we are considering in this proceeding additional sharing of spectrum currently allocated for TV broadcasting service, the improved utilization of existing land mobile spectrum through the implementation of improved technology is also being vigorously pursued. In this regard, the Commission recently adopted a *Report and Order* which permitted

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[4] These figures assumed an annual private land mobile growth rate of 6.2%.

[5] Petition for Rule Making filed by the Land Mobile Communications Council, RM-4829, received June 18, 1984.

[6] Petition for Rulemaking filed on October 29, 1984, to allow expanded sharing of the 470-806 MHz Television band by Land Mobile stations in the twenty-one largest metropolitan areas. In view of the petition's relevance to the issues considered herein, it will be included as comments in the Docket file in this proceeding.

[7] A Petition for Rulemaking was filed on September 1, 1981, requesting the use of Channel 15 and 16 in Los Angeles, California. A Supplement To Petition For Rule Making was filed on November 4, 1983, requesting the immediate assignment of TV Channel 19 in the Los Angeles area as well as expanded sharing of the UHF TV band in metropolitan areas. A *Notice of Proposed Rule Making* in Docket 84-902, 49 Fed. Reg. 45875, November 21, 1984, addressed the immediate request for Los Angeles County. The remainder of that petition, because of its relevance to the issue considered herein, will be included in the docket file in this proceeding.

[8] *First Report and Order*, Docket No. 18261, 23 FCC2d 325 (1970). The action enacted a 50 dB co-channel and 0 dB adjacent channel protection ratio for UHF TV stations at a 55 mile grade B service contour. A 40 dB co-channel ratio was adopted for some New York, Cleveland and Detroit channels.

narrowband technologies in the 150-170 MHz private land mobile band.[9] We have also adopted a *Notice of Proposed Rule Making* proposing to release twelve megahertz of the 900 MHz land mobile reserve spectrum for private land mobile use. And, with the increasing demand of private land mobile services in mind, the Commission proposed that more efficient use be made of this spectrum by employing narrowband technologies.[10] The Commission believes that new technologies will play an essential part in satisfying the projected growth of private land mobile services.[11] Cost and implementation considerations however, argue against relying totally on new technologies to provide capacity through the end of the century. Even assuming the eventual adoption of the proposal for new 900 MHz spectrum and the implementation of other developing technologies, such as digital techniques, narrowband techniques, and adaptive antennas, it appears that the capacity of the spectrum allocated to private land mobile services will in some areas fall short of the demands projected through the end of this century. Since part of these demands involve essential public services such as police and fire protection, medical assistance, transportation, and energy generation and distribution, as well as many other services needed by the public, it is desirable to find solutions to these projected shortages.

7. Since 1970, spectrum sharing between land mobile and UHF television has helped to accommodate a significant portion of the demands of private land mobile service in major metropolitan areas. Under the rules adopted in Docket No. 18261,[12] specific television channels were reallocated for land mobile use within a limited area surrounding each of thirteen major urban centers.[13] Such a geographical sharing arrangement still appears to offer the best near-term possibility for addressing land

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[9] *Report and Order* Docket No. 84-279, adopted on March 1, 1985, 50 Fed. Reg. 13596, April 5, 1985.

[10] *Notice of Proposed Rulemaking* in Gen. Docket 84-1233 adopted on November 21, 1984. 50 Fed. Reg. 1582, January 11, 1985. The Notice proposes a narrowband channelization plan for the frequencies 896-902 and 935-941 kHz using 12.5 kHz channels. Also, comments were requested regarding the use of 5, 6.25, 7.5, 10 and 15 kHz channels.

[11] Dale N. Hatfield Associates has developed projections claiming that all capacity requirements could be satisfied in existing spectrum if we could take advantage of the multiplicative effects of frequency reuse, channel splitting and increased loading afforded by new technologies. The information is contained in a report entitled "The Role of New Technologies and Spectrum Management in Meeting the Demand for Private Land Mobile Radio Telecommunications Capacity", D. Hatfield, G. Ax and A. Miller, Dale N. Hatfield Associates, Boulder, Co., November 1982.

[12] Reference Docket 18261. *First Report and Order.* See footnote 8 *supra.* The action identified 10 urban areas; three other areas were added later in the proceeding.

[13] The designated urban centers were Boston, Chicago, Cleveland, Dallas/Fort Worth, Detroit, Houston, Los Angeles, Miami, New York/N.E. New Jersey, Philadelphia, Pittsburgh, San Francisco/Oakland, and Washington, D.C./Maryland/Virginia.

mobile needs in the larger urbanized areas. However, it has been over fourteen years since the Commission established standards for land mobile services to share UHF television spectrum on a geographical basis. Since that time, modifications have been made in the table of TV assignments and a number of new UHF television stations have been authorized. Additionally, in 1982 the Commission adopted rules implementing provisions for Low Power Television (LPTV) stations.[14] Approximately 40,000 applications, many for LPTV stations near major markets, have been filed. To date over 700 LPTV stations have been authorized. As noted above, the *Further Sharing Report* shows that, assuming the current interference protection criteria and land mobile operating parameters are unchanged, few, if any, channels could be made available for land mobile sharing in some of the larger metropolitan areas without having a significant impact on TV service. We believe that reexamination of our protection criteria and other rules may lead to the availability of spectrum to private land mobile services where most required, while minimizing the impact on TV broadcast services.

8. Accordingly, the objective of this proceeding is to propose additional spectrum to provide additional communication capacity for land mobile service. We propose to permit further land mobile use of the UHF TV spectrum for several reasons. First, interservice use of TV channels 14 to 20 in major metropolitan areas, as provided for in Docket 18261, has proven practicable. Second, we have evaluated possibilities for further use of the UHF-TV band by land mobile and consider our proposal to be technically feasible. Third, preliminary review of other spectrum, such as the 216-225 MHz band or bands above 1 GHz, indicates that no choice offers such promising possibilities for land mobile use as does the UHF-TV band. Furthermore, we propose to allow land mobile use of UHF-TV channels on a shared basis because the impact on broadcast users would be less than if we reallocated the spectrum for land mobile use only, which would require repacking of existing broadcast stations. Repacking would involve the relocation of existing UHF-TV stations into the remaining portion of the UHF-TV spectrum — an action that would be costly and would cause major disruption of existing TV service.

Geographical Areas Needing Additional Capacity

9. The *Future Requirements Report* projected that there would be private land mobile spectrum shortfalls in twenty-one urban areas by the year 1990. A part of these shortages will be satisfied through recent Commission actions. As noted above, the *Report and Order* in Gen. Docket 84-279 implemented a 5 kHz channeling plan in the 150 MHz band. The number of channels that will ultimately be used is still uncertain,

[14] *Report and Order*, Docket No. 78-253, 47 Fed. Reg. 21468, May 18, 1982.

since this will be determined by the extent of the ability to use interstitial narrowband channels in loaded areas and by the extent of conversion of existing authorizations to narrowband. An analysis undertaken by Sachs/Freeman Associates[15] indicates that only about 50 interstitial channels will be usable in the New York market, with the number increasing in less congested markets where there are less restrictions due to the need to protect existing authorizations. Also, the Commission has recently taken other steps to increase spectrum available for private land mobile services. The *Notice* in Gen. Docket 84-1233 proposes that the 896-902 MHz and 935-941 MHz bands be allocated to private land mobile, with a 12.5 kHz channeling plan the preferred alternative. Adoption of such a plan would mean an additional 480 channel pairs for private land mobile use. Thus, recent actions taken by the Commission could mean that over 530 additional channels may become available in major areas before 1990.

10. While additional channels will be established, we note that the increasing use of digital, trunking and cellular technologies will reduce private spectrum requirements to some extent in the same time period. Nonetheless, based upon information developed in the *Future Requirements Report*, substantial shortages may remain in at least nine urban areas. These areas are Los Angeles/San Diego, New York, Baltimore/Washington, Philadelphia, Cleveland/Detroit, Chicago, San Francisco, Dallas, and Houston.

11. In eight of these urban areas, we have identified several UHF television channels in each area which can be made available to private land mobile radio with minimal impact on existing full service television. This can be achieved by modifying existing LM/TV interservice sharing rules and deleting some vacant UHF television allotments. Making these channels available would aid the private land mobile services in the areas of greatest need. However, this action may not totally satisfy communication needs in the New York and Los Angeles/San Diego areas. To attempt to make additional channels available to these two areas would be desirable from the point of view of the land mobile services, but would adversely affect existing full service TV stations, not to mention have a further impact on LPTV and translator services. We do not foresee any significant UHF sharing opportunities in the New York and Los Angeles areas beyond that provided in this rulemaking. Therefore, in these two cities, additional communications requirements may need to be met by other means such as employing new technology or accepting heavier loading on the available channels. Regarding one of the nine areas with projected shortages — Cleveland/Detroit — international coordination is

[15] "Final Report for Evaluation of the Use of New Narrowband Technologies in the Existing Private Land Mobile Radio Frequency Allocations," Stanley I. Cohn and Ernest R. Freeman, Sachs/Freeman Associates, Inc., Bowie, Maryland, August, 1984.

a concern. Due to the differences in U.S. and Canadian allocations, shortages of broadcasting as well as private land mobile spectrum exist in this area, requiring other spectrum resources to be used to provide relief. In this regard, it should be noted that some spectrum relief for land mobile services in the Cleveland/Detroit area was recently proposed in the 421-430 MHz band.[16]

Technical considerations for sharing

12. The amount of sharing between the television and land mobile services possible in a given geographical area depends on the values assumed for various technical parameters, the degree of protection intended for TV service, the permissible locations of land mobile base stations, and the permitted operating range of mobile stations. The sharing arrangement adopted in Docket 18261 provided protection for co-channel and adjacent channel full service TV stations and pending full service TV applications.[17] Co-channel protection was based on a 50 dB desired-to-undesired (D/U) field strength ratio at a hypothetical 55-mile Grade B contour, except in New York, Cleveland and Detroit, where a 40 dB ratio was used for some stations.[18,19] Adjacent channel TV protection was based on a 0 dB D/U ratio.[20] Land mobile fixed stations were not permitted within one mile of a TV station operating on a channel 2, 3, 4, 5, 7, or 8 channels removed from the land mobile channel.[21,22] The sharing criteria used in Docket 18261 were based on limited measurement data and estimated values of pertinent parameters. Because of the uncertain-

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[16] *Notice of Proposed Rulemaking* in Gen. Docket 85-113, adopted on April 15, 1985.

[17] Land mobile stations operating within the six megahertz occupied by a TV channel were considered to be co-channel. A land mobile station operating within the 6 megahertz band directly above or below a TV channel was considered to be adjacent channel.

[18] A 50 dB protection ratio means that the amplitude of the desired signal is more than 300 times greater than the amplitude of the undesired signal at the grade B service contour. A 40 dB protection ratio means the desired signal is 100 times greater. From this, it follows that the undesired signal can be 3 times as great with a 40 dB protection ratio than with a 50 dB protection ratio. The 55-mile grade B service contour was based on a hypothetical TV station with an effective radiated power of one megawatt and a transmitting antenna height above average terrain of 2000 feet.

[19] The selection of a 40 dB as a criterion for land mobile use of Channel 15 in New York and Cleveland and Channel 16 in Detroit was based on particular circumstances. For channels 15 in both New York and Cleveland, terrain features in the direction of the co-channel protected TV stations provided additional protection to TV co-channel viewers from land mobile operation. For Detroit, the predicted grade B of the co-channel facility to be protected extended only to 44 miles — 11 miles less than the 55 mile criterion established in Docket 18261.

[20] A 0 dB D/U ratio means that the undesired signal can be as great as, but no stronger than the desired signal at the grade B service contour.

[21] The term "fixed" refers to a base, control or mobile relay station.

[22] These prohibitions are referred to as the "IM & IF Taboos" in UHF Television allocations. These "Taboos" are set forth in Section 73.610 of the Commission's Rules.

ties concerning many of these parameters, the criteria used were deliberately conservative. Based on the following considerations, we are proposing in the instant proceeding to modify some of these criteria.

Receiver Susceptibility

13. For purposes of this proceeding, receiver susceptibility will be defined by the TV-to-LM signal ratio at the TV receiver antenna terminals which will produce a given degree of degradation to the TV reception, which is usually expressed as either perceptible or objectionable interference. The measured ratio varies from TV receiver model to model, and for a given receiver depends on the frequency of the interfering signal with respect to the TV visual carrier. It may be also influenced by the desired signal levels, picture content and viewing conditions, such as ambient lighting and distance of the viewer from the screen.

14. In support of the Commission proceeding in Docket 18261, the FCC Laboratory conducted a number of tests to determine typical co-channel and adjacent channel receiver susceptibility ratios.[23] Ten different models of TV sets were tested at VHF and the ratios were determined based on the same degree of objectionable interference for the co-channel and adjacent channel cases.[24] The co-channel susceptibility ratio ranged from 42 dB to 48 dB with a median value of 43 dB. The adjacent channel susceptibility ratio ranged from 20 dB to –40 dB, depending on the frequency separation between the undesired LM signal and the TV channel edges, on the power of the TV desired signal and on whether the upper or lower adjacent channel was being considered. For example, the ratio was as much as 40 dB lower when the undesired signal was at the far edge of the adjacent TV channel; and it was as much as 20 dB lower when the power of the desired signal was a lower value equal to grade B service than when the power of the desired signal was equal to city grade service. The adjacent channel susceptibility ratio was higher when the interfering signal was on the lower adjacent channel that when on the upper adjacent channel. Similar tests were conducted in 1976 by the Canadian Department of Communications (DOC).[25] The DOC tests involved sampling 52 different TV models at UHF. The co-channel receiver susceptibility ratios for 50% and 90% of the receivers tested did not exceed 40 dB and 45 dB, respectively. The adjacent channel ratios varied in a similar fashion as in the FCC tests.

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[23] FCC Report entitled "Interference to TV by Other Services." Project No. 2229-45, Part I, II, III [1968, 1969].

[24] The staff's investigations tend to confirm that results are the same at UHF.

[25] DOC Report entitled "Task Force on UHF-TV Taboos." Project 6, Assessment of Potential Land Mobile Interference to/from UHF Television. [1976]

Antenna Characteristics

15. The directional characteristics and polarization of UHF-TV receiving antennas discriminate against land mobile interference. While receiving antennas in the TV services used near Grade B contours are generally horizontally polarized and receive efficiently in one specific direction, antennas used in the land mobile services are generally vertically polarized and radiate in all directions. Most, if not all, outdoor antennas used to receive TV signals at or near the grade B service contour are highly directional with an average gain on the order of 8 dB and a front-to-back ratio of 10 to 20 dB.[26] While an antenna's front-to-back ratio is a fairly good indicator of the level of discrimination achievable against land mobile interference, the net discrimination effect varies significantly, depending upon the configuration, installation and age of the entire TV receiving antenna system.

16. With regard to the polarization discrimination between land mobile transmitting and TV receiving antennas, a number of studies have indicated that under certain conditions, a polarization discrimination factor of 20 to 30 dB is achievable. However, an average polarization discrimination factor on the order of 10 dB is commonly cited.[27] In general, polarization discrimination is higher in open areas and lower in thickly wooded areas and other areas where the reception is poor.

Propagation

17. The relative field strength of TV and LM signals at an antenna is influenced by atmospheric conditions, terrain and obstacles along the propagation path, and by reflection from objects such as buildings and

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[26] Report entitled "Program to Improve UHF TV Reception." Project No. A-2475 Georgia Institute of Technology. [1980]. The gain of an antenna is a rating expressing how much better one transmitting or receiving antenna is with respect to a reference antenna. The front-to-back ratio is the ratio of the maximum power received in the main lobe and the power received in the back 180° of the antenna pattern.

[27] See the following Reports:

FCC report entitled "Polarization Discrimination in Television Broadcasting". FCC Report T. R. R. 4.3. 10 [1958]

FCC Technical Memorandum entitled "Options for Relief of Interference to TV Channel 6 from Educational FM Broadcast Stations." OST TM 82-3 [1982]

BBC Report entitled "Aerial Discrimination against Orthogonally-Polarized Transmissions at UHF." [1964]

CCIR Volume V(1982), Report 239-5 Section 4.5, Report 567-2 Section 4, and Report 722-1.

NBS Report No. 6099, entitled "Performance of VHF Receiving Antennas Propagation".

trees. In Docket 18261, the R-6602 propagation curves[28] were used to predict service areas of TV broadcast and land mobile operations and to determine minimum separation distances needed between land mobile and television stations. In making these calculations, no allowances were made for the variability in field strength from location to location — known as location variability — or for special situations such as attenuation from major obstacles or enhanced propagation due to superefraction and ducting. At UHF, location variability varies from area to area, and usually ranges between 10 and 18 dB.[29] An average value of 12 dB is commonly used.[30]

Sharing Criteria

18. In this proceeding, we propose to make several modifications to the sharing criteria used in Docket 18261. These modifications include changes in the co-channel D/U ratio, the computation of the TV protected service contour, and the land mobile operating parameters.

19. We propose to reduce the field strength D/U ratio for co-channel operation from 50 to 40 dB.[31] It was recognized during the Docket 18261 proceedings that the 50 dB ratio was conservative. Based on the information discussed above, we believe the 40 dB ratio is more appropriate and would result in minimal impact on co-channel TV service. For example, if we assume a receiver susceptibility ratio of 45 dB,[32] an average TV receiving antenna discrimination of 10 dB (due to the antenna pattern and cross-polarization), and a location variability of 12 dB for both the TV and LM signals, a 50 dB D/U ratio would provide protection for 95 percent of the potential TV viewers at the Grade B contour. For the same assumptions, a 40 dB ratio would provide protection for 88 percent of the potential viewers.[33] However, we are aware that significant uncertainties still exist concerning many of the factors that go into determining the

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[28] FCC report entitled "Development of VHF & UHF Propagation Curves for TV and FM Broadcasting." FCC Report No. R-6602 [1966]

[29] CCIR Volume V (1982), Report 239-5 Section 4.3 & Report 567-2 Section 6.

[30] FCC Report T.R.R. 2.4.16 "UHF Propagation Within Line of Sight" [1951]

[31] On April 26, 1985, the Association of Maximum Service Telecasters and the National Association of Broadcasters requested, by letter to the Chairman, that the Commission establish a joint industry-government advisory committee to investigate and advise the Commission as to the protection criteria necessary to prevent interference to UHF television stations from land mobile stations operating in the UHF spectrum. We believe that advice from such a committee would be useful in developing final rules. Formation of an advisory committee and its terms of reference will be the subject of an Order to be released in the near future.

[32] Based on the DOC study, a 45 dB co-channel receiver susceptibility ratio applies to 90% of the TV sets.

[33] The term "potential TV viewers" refers to the percentage of locations at the grade B contour where viewers receive a signal level of 64 dBu or greater for at least 50% of the time. This is defined in the broadcast rules as 50% of the locations.

appropriate ratio, including the receiver susceptibility as affected by noise and other interference, antenna characteristics (cross polarization discrimination and front-to-back ratio) as affected by installation and local environment and propagation variabilities. We, therefore, solicit comments concerning the appropriate value of the field strength ratio as well as on these factors. We also request comments on the acceptable degree on TV reception degradation for appropriate percentages of time and location and on the relationship between this and the above factors.

20. Also, while we are not proposing any changes with regard to the adjacent channel protection ratio at this time, we solicit comments on the appropriateness of maintaining the Docket 18261 criterion of 0 dB D/U ratio for adjacent channel operation, on whether land mobile should be allowed to operate in the same area on portions of the adjacent channel, and on whether mobile units should be allowed to operate inside the predicted Grade B contour on an adjacent TV channel.[34] In addition, we solicit comments on whether the one mile separation requirement for certain channel separations (2, 3, 4, 5, 6, 7, and 8) should be imposed and on whether protection criteria should be introduced for TV stations 14 and 15 channels below proposed land mobile operations.[35]

21. In determining the necessary separation distances between LM operations and existing TV stations, we propose to base the protected Grade B contours on the licensed power and antenna height above average terrain of the TV stations rather than use the 55-mile hypothetical contour used in Docket 18261. The service contours are determined in accordance with Section 73.684 of the FCC rules. We are aware, however, that adoption of these proposals might have an impact on future modification of existing licensed TV facilities. An affected TV station could increase its power and/or antenna height at a later date, but the resulting service area might be less than expected in the direction of land mobile operations provided for in this proceeding.[36]

22. For the land mobile base station operating parameters, we assumed a reference base station effective radiated power of one kilowatt and a reference antenna height of 500 feet HAAT (height above average terrain elevation from 2 to 10 miles in the pertinent direction). For mobile units, an effective radiated power of 100 watts and an antenna height of 100 feet above average terrain were assumed. These reference values

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[34] Testing has been performed to determine the feasibility of utilizing UHF-TV Channel 19, or a portion of that channel, to provide near term relief for public safety operations in Los Angeles area. See Notice of Proposed Rulemaking in Docket 84-902, 49 Fed. Reg. 45875, November 21, 1984.

[35] Channels 14 and 15 are referred to as the sound image and picture image taboos. These taboos are set forth in Section 73.610 of the Commission's Rules.

[36] In Docket 18261, no provisions were made to protect existing full service facilities from LM interference beyond the 55 miles grade B contour.

were used to identify approximate areas of operation in each city. In addition, we are proposing to restrict the location of base stations to within 30 miles and mobile operation to within 50 miles of the center of a city.[37] In addition, base station locations must be chosen to provide protection to television facilities, as directed in the previous paragraphs. The actual areas of operation will also depend on specified power and antenna height limitations, which will be the subject of a subsequent rulemaking proceeding. However, we now solicit comments on whether these assumptions concerning operating parameters and these restrictions on operations are appropriate for typical land mobile operations.[38] We assume that, in general, the separation distances required to protect existing TV stations from land mobile interference will result in adequate protection of land mobile service from TV interference. We realize that channelization plans for specific areas will have to avoid frequencies near the visual, aural and color carriers of nearby co-channel TV stations. Since in some situations the possibility may exist for interference to land mobile from TV intermodulation products, local oscillator radiation or adjacent channel spillover, we solicit comments on whether these land mobile protection criteria are appropriate.[39]

Channels Available for Land Mobile

23. In considering further use of the UHF-TV spectrum for land mobile services, the Commission analyzed two alternative approaches to selecting UHF-TV channels that could be made available for land mobile. The alternatives considered were a channel repacking approach and a channel sharing approach. Each has benefits and liabilities associated with manufacturability of land mobile equipment and impact on TV broadcasting. For reasons discussed in the following paragraphs, we have settled on the channel sharing approach.

24. In determining which TV channels were feasible to be made available for land mobile use, we considered the manufacturability of reasonably priced land mobile equipment and the impact of land mobile use on TV broadcasting service. Two factors of importance in the manufacturability of land mobile equipment are the frequency range over

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[37] Docket 18261 assumed the use of 200 watt and 100 feet as reference values. In this proceeding, since the mobile operating area is reduced from 30 miles to 20 miles around the base station, we have selected a 100 watt limit.

[38] In urban areas such as Los Angeles and San Francisco, this 30 mile restriction may preclude utilization of some commonly used private land mobile antenna sites. We request comments on whether a larger radius should be used in these cases, and if so, what the radius should be and what impact on TV service would result from its use.

[39] OST Report entitled "Analysis of Technical Possibilities for Further Sharing of the UHF Television Band by the Land Mobile Services in the Top Ten Land Mobile Markets." FCC/OST R83-3. Pages 10 & 11 contain a discussion of the possibilities for interference from TV to land mobile.

which the equipment must tune and the frequency separation between base and mobile units. There are practical limits for each of these factors which enable the building of reasonably priced equipment. Based on characteristics of existing land mobile equipment and discussions with manufacturers, we concluded 70 to 100 MHz to be the practical tuning range limit. The necessary base/mobile frequency separation is dependent on where in the spectrum the land mobile equipment operates. For example, current 470-512 MHz equipment employs a separation of 3 MHz while current 800 MHz equipment employs a separation of 45 MHz. For our purposes, we considered separations of 20 to 60 MHz to be practical. In order for land mobile equipment to be reasonably priced, there must be some standardization of these two parameters. Requiring different equipment to be manufactured and marketed for each area of interest would reduce the likelihood that manufacturers would be able to produce new equipment economically. In Dockets 18261 and 18262, the Commission identified sufficient channels within a relatively narrow frequency range and made them available to a large enough segment of the land mobile community so that mobile radio equipment could be obtained at reasonable prices (e.g., Docket 18261 made two channels out of channels 14-20 available for land mobile in each of 10 cities or one channel in 3 cities).

25. In order to identify spectrum for land mobile use in the areas of interest, we first considered "repacking" the UHF-TV band. Repacking would entail the reallocation of a number of UHF-TV channels for land mobile services, as was accomplished in Docket 18262.[40] Existing TV stations in the reallocated spectrum would be moved to other allotments, i.e., "repacked" into remaining TV spectrum. Any repacking scheme, whether to provide land mobile with contiguous channels or a set of channels with a convenient base/mobile separation, burdens those broadcast stations on the channels to be reallocated with the task and possibly the expense of rechannelization. Some schemes could have significant cascading effects on the Table of TV Allotments, necessitating rechannelization by other broadcast stations and further disrupting TV service. In some markets finding alternative TV channels might be extremely difficult unless there were some relaxation of the UHF-TV taboos to remove the channel separation requirements imposed on TV stations.[41] This could entail awaiting the implementation of new, more expensive

[40] *First Report and Order and Second Notice of Inquiry* in Docket No. 18262, 35 FR 8644, June 4, 1970. In this proceeding the Commission reallocated UHF-TV channels 70-83 to the Land Mobile Service.

[41] The "taboos" set forth minimum mileage separations for TV stations assigned to the same channel, those assigned to adjacent channels and those assigned to certain other channels affected by design of TV equipment. See Footnote 22, *supra.*

kinds of TV receivers. Given our desire to minimize impact on TV services we elected not to use the channel repacking approach.

26. Then, in order to identify TV channels which could be candidates for land mobile use in the areas of interest, we considered those channels which are not allotted in the areas and on which land mobile operations would cause no disruption to existing full service TV stations or pending full service applications, according to the proposed criteria. However, this set of channels would not provide sufficient spectrum in some areas; and, further, they are so widely dispersed throughout the UHF band that, for the reasons discussed above, it would be impractical to manufacture and market land mobile equipment. To obtain sufficient numbers of channels to meet the requirements of land mobile, we also considered using vacant TV channels that are allotted in the areas but do not currently have licensed assignments or pending applications.[42] Including use of this set of channels, we were able to develop a practical channel sharing plan. This approach, which makes use of unaffected channels or vacant allotments, will not displace any full service TV stations. However, some vacant allotments would be lost if no substitutions for them could be made and some translators and low power operations would be affected, as discussed later herein.

27. Our proposal accounts for the need to provide a practical land mobile equipment tuning range by dividing the UHF-TV spectrum into several bands, each of a reasonable frequency range. Analysis of the candidate channels indicated that an 84 MHz wide range would make good use of the channels while falling within the 70-100 MHz range limit considered practical. We designated three operating ranges or bands as follows:

Band I:	Channels 23 to 36 (84 MHz)
Band II:	Channels 35 to 48 (84 MHz)
Band III:	Channels 56 to 69 (84 MHz)

We referred to the existing 470-512 MHz band, channels 14-20, as Band 0. Channel pairs within these bands were analyzed for base/mobile separations between 20 to 60 MHz to determine what common separation would make best use of the candidate TV channels. The majority of the possible pairs within these bands occur with either a four or six channel separation. Accordingly, we developed a proposal based on using candidate TV channels to form pairs with either four or six channel separations.

28. The table below lists candidate channels selected from bands 0, I, II and III which we propose to make available for land mobile operation in the cities shown. The channels in band 0 would be used with a 3 MHz

[42] While this analysis was in progress, an application was filed for Channel 48 in Bakersfield, California.

base/mobile separation as is currently done in this band. Channel pairs in Bands I, II and III have a separation of from 4 or 6 channels, with most pairs having a 6 channel spacing. The channel proposed for base operation is followed by the channel proposed for mobile operation (i.e., base/mobile). We propose to permit the use of 1 to 3 channel pairs, making 12 to 36 megahertz of additional spectrum available, for land mobile in each major area. In San Francisco and Los Angeles, we have identified two alternative pairing schemes using a common channel, Channel 28 in San Francisco and Channel 32, in Los Angeles. Only one of the pairs with a common channel can be selected in those areas and comments are invited on which is the better choice, considering both land mobile needs and broadcast impact. Also, in all areas except New York, Chicago and Houston, we identified alternative channel pairs with either 4 or 6 channel spacings and comments on the choice of spacing are invited. The column labeled "Amount of Spectrum" shows the proposed total amount of frequency spectrum to be made available for land mobile in each area from the candidate channels, according to the expressed preferences. Comments, likewise, are invited on this aspect of the sharing proposal.

29. Under the column of the table headed "Impact", we have identified the vacant allotments or translator stations which are affected by the proposal. We believe that substitute allotments may be found to prevent loss of some of these vacant slots, and this will be the subject of a further proceeding. However, regarding the identified translators, we do not propose to protect them and their operation would become secondary to land mobile operation. This means that some translator operations might have to be terminated. In addition, Appendix C contains tables indicating the number of pending low power television and television translator applications affected within 50 miles of the center of each of the urban areas. (The processing of low power applications is discussed below at paragraph 35.) The number of LPTV construction permit authorizations that may be precluded or delayed by this proceeding will depend on the outcome of lotteries in these areas. However, it is estimated that from 19 to 24 LPTV construction permits could be affected. Significantly, a candidate channel appears to afford the only opportunity for a low power television station in New York (Channel 19), Los Angeles (Channel 26) and Philadelphia (Channel 42). In Los Angeles and Philadelphia, alternate channel choices for land mobile sharing are being proposed. The record in this proceeding will guide us in determining how many and which channels to make available for private land mobile operations, taking into account the public's expressed need for land mobile and low power television services. In this regard, we note that while there will be substantial shortages of land mobile communications capacity in the eight areas, they are already served by a number of full service television

signals. For instance, it appears that about 12 signals can be received over the air in New York City. Apparently, about 18 signals are available in Los Angeles, 7 in Philadelphia, 13 in Chicago, 15 in San Francisco, 18 in Washington, 7 in Houston, and 10 in Dallas.

Urban Area	*Candidate Channels*	*Operating Band*	*Amount of Spectrum*	*Impact*
New York	19	0	30 MHz	None
	27/33	I		One translator on
	34/28	I		Channel 28 (W28AB)
Los Angeles	26/32 or	I	36 MHz	Vacant Allotment on
	32/36			Channel 32, Santa Barbara.
	48/42	II		Vacant allotments on Channel 41, Ventura and Channel 48, Bakersfield.
	60/66	III		Two translators on Channel 60 (K60BB and K60BD) one on Channel 66 (K66BL).
Chicago	41/47	II	24 MHz	None
	64/68	III		Vacant allotment on Channel 64 in Streator, Il.
San Francisco	18	0	18 MHz	One translator on
	24/28 or	I		Channel 19 (K82BC)
	34/28	I		None
				None
Philadelphia	26/32 or	I	12 MHz	One translator on
	42/46	II		Channel 26 (W26AD)
				None
Washington,	36/30 or	I	12 MHz	None
D.C.	39/35	II		None
Houston	16	0	18 MHz	None
	41/35 or	II		None
	63/69	III		None
Dallas	17	0	18 MHz	None
	41/35 or	II		None
	66/62	III		None

30. Appendix B contains tables which identify the proposed full service TV facilities to be protected by private land mobile stations. It shows the call signs and distance to the predicted grade B contour of the affected TV stations. Maps displaying the proposed land mobile operating areas for each urban area and candidate channels have been included in the docket file for reference. The actual area of land mobile operation will depend on specified land mobile power and antenna height limitations. These operating parameters will be the subject of a separate rulemaking proceeding concerning land mobile technical standards and procedures

after the allocation issue is resolved. (Coordination procedures with Canada and Mexico will be developed prior to licensing.)

31. In proposing this sharing arrangement, the Commission recognizes a number of concerns and considerations important to the final outcome of this proceeding. First and foremost is the objective of providing an opportunity for greater use of the UHF spectrum for private land mobile services while minimizing the impact on broadcast services. To achieve this objective we have relied significantly on the work performed in developing the *Future Requirements Report* and the *Further Sharing Report* for guidance. The *Future Requirements Report* projected that in 1990 private land mobile spectrum requirements would be severe in the markets for which we are proposing additional spectrum. Given the likelihood of additional frequencies for private land mobile use in the 900 MHz band and the potential for more spectrum efficient technologies in all portions of the spectrum, we do not believe it necessary to propose sharing of the UHF-TV spectrum beyond those areas discussed above. We expect that requirements projected for areas outside of these major markets will be accommodated through other means.

32. On the other hand, the *Future Requirements Report* projected spectrum requirements in some areas, such as New York and Los Angeles, substantially in excess of the additional 30 and 36 megahertz, respectively, proposed herein. However, TV broadcast needs are very significant in these areas. We believe it necessary, therefore, to restrict the number of channels available for sharing so as not to reduce private land mobile shortages at the undue expense of UHF-TV in any area. In these areas capacity shortfalls will probably have to be accommodated through applications of high technology or through accepting heavier loading on available channels. The primary issue here is the appropriate balance between TV broadcast and private land mobile services. We believe this NPRM strikes a balance between the important needs of both services.

33. In the Federal Communications Commission Authorization Act of 1983, P.L. 98-214, enacted December 8, 1983, 97 Stat. 1467, Congress directed the Commission to review the current and future spectrum needs of the nation's public safety authorities and to develop a plan which assures that the needs identified by the public safety community are met. In response to this legislation, on March 1, 1984, the Commission adopted a *Notice of Inquiry* to seek comments regarding current and future spectrum needs. Almost 300 comments were submitted by interested parties in response to the *Inquiry.* Based on this record, a report will be issued in the near future. That will be followed by an effort to develop a plan to meet the identified needs. While this proposal is not specifically

designed to meet public safety needs, we expect it to provide relief for public safety as well as other land mobile use. If early consideration of comments addressing public safety interest in this spectrum is useful, we welcome such comments.

34. As noted in paragraph 6 above, narrowband channeling was part of the proposal to release 900 MHz spectrum for private land mobile services. The Commission here would also like to require or encourage more efficient technologies, but is aware of the possibility of some delay associated with incorporation of new technologies into equipment. We note, however, that there is not at present any land mobile equipment designed for the frequency bands proposed here. The process of designing, building, and marketing new equipment typically seems to require two to three years, when the basic technology is already at hand. We expect that additional delay for incorporating spectrum efficient modulation or operational features into the new equipment will be modest compared to the basic development time for the new equipment, whether those techniques be single sideband, narrowband FM, digital voice, trunking, or other improvements for which the basic approaches are reasonably well understood. Commenters are requested to address the feasibility of employing more spectrum efficient technology in this shared UHF spectrum. This issue will be treated further in the separate rulemaking proceeding concerning land mobile technical standards and procedures.

Other Related Matters

Interim Procedure For Low Power TV

35. The processing of Low Power Television (LPTV) applications is proceeding in a routine and satisfactory manner, and it is our desire to disturb that as little as possible. We will continue to conduct lotteries, release proposed grant lists, accept and address petitions to deny, and complete all other administrative procedures without regard for the proposals made in this docket, with one important exception. If at the time of grant of a construction permit the LPTV application chosen by lottery could cause predicted interference to the land mobile operations proposed herein, we will withhold the grant. Mutually exclusive applications that were not chosen in the lottery will be dismissed. If the LPTV applicant can eliminate the potential for interference by a minor amendment we will permit the applicant to do so, and we will then issue a construction permit. If the LPTV application cannot be amended (or the applicant chooses not to amend) the grant of a construction permit will be held in abeyance until we have decided which channels are to be reallocated to the land mobile services. At that time the applicant will be given a chance to amend to meet the adopted land mobile protection standards. If the LPTV applica-

tion is still in conflict with any of the choices we have made, it will be dismissed. Lotteries will not be reconstituted or repeated simply because a winning application is denied as a consequence of the exception described above. Any opportunities created as a result of such dismissals will be available for new applications when we resume accepting LPTV applications. Further, with this rule making proceeding the coordination procedure referred to in paragraph 46 of the *Low Power Report and Order* will be terminated.[43]

36. LPTV operation would be secondary to land mobile in the urban areas discussed and to determine whether a particular LPTV application could cause interference to land mobile operation, we have developed interim technical standards that LPTV applicants will have to comply with prior to the issue of a construction permit while this proceeding is open. We have developed a number of field strength values for different transmitting antenna heights above average terrain (HAAT) which low power stations would not be permitted to exceed at a 50 mile protected land mobile contour.[44] Specifically, the F(50,10) field strengths of co-channel LPTV stations would not be permitted to exceed 47 dBu for transmitting antenna heights of 400 feet or less above average terrain, 37 dBu for transmitting antenna heights of between 400 and 1000 feet above average terrain and 27 dBu for transmitting antenna heights more than 1000 feet above average terrain. For adjacent channel operation, we intend to limit the F(50,10) signal level of low power TV stations to 76 dBu at the protected land mobile contour.[45] Comments are invited on these low power limitations to protect the land mobile allocation. A factor to consider is that low power TV must accept interference from full service TV stations and existing land mobile stations and will not be assured protection from future land mobile interference.

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[43] "... Specifically we shall examine all low power TV applications within at least 100 mile radius of the ten largest U.S. metropolitan areas to determine what accommodation, if any, is possible if we decide to provide some land mobile spectrum ..." The ten areas were: Boston, Chicago, Dallas, Detroit, Houston, Los Angeles, New York, Philadelphia, San Francisco, and Washington, D.C. See *Report and Order*, Docket No. 78-253, 47 Fed. Reg. 21468 (May 18, 1982), para. 46.

[44] In paragraph 21 we proposed a land mobile operating area of 50 miles from the center of the city. This area is defined as the land mobile protected contour. The field strength values were derived from the low power restrictions of Section 74.709 of the Commission's rules, modified to avoid the possibility of interference from a low power TV site at high elevation to a land mobile base site.

[45] The F(50,10) signal values are obtained using the curves in Section 73.699 of the FCC rules. Where the distance using F(50,10) curves is less than 10 miles, the F(50,50) curves should be employed. The antenna height to be used is the height of the center of radiation above the average terrain from 3 km to 16 km for each radial.

Applications for New and Modification of Full Service TV Stations

37. We will continue to accept and process applications for new full service stations or authority to modify the facilities of existing stations. However, we will protect full-service television stations on the basis of existing facilities, i.e., those for which a license or a construction permit was issued before the date this *Notice* is adopted. If an application for a new station is inconsistent with one of the proposed land mobile allocations, we will determine the degree of protection, if any, to be afforded the proposed television facility on a case-by-case basis in this rule making. New service resulting from the approval of applications received after adoption of the *Notice of Proposed Rulemaking* in this proceeding, whether for new stations or authority to modify the facilities of existing stations, must accept such interference as may result from the operation of land mobile facilities permitted under the rules adopted in this proceeding. We believe this policy is essential to preserve the limited opportunities remaining to relieve land mobile congestion in the major markets. Comments are invited.

Developing Use of Vacant Channels

38. Various ideas for the use of vacant UHF-TV channels are under development. For example, we are aware that the Advanced Television Systems Committee[46] is currently investigating the possibility of improving existing television standards and providing some form of high definition television. These enhancements may require more spectrum, contiguous channels, or greater protection. Unused channels may also provide capacity for expanded remote pickup broadcasts and studio-to-transmitter links. The Commission requests comments on the effect that land mobile and UHF-TV sharing might have on alternative uses of the spectrum for broadcast-related services.

Flexible Spectrum Use Proposal

39. The preceding proposal reflects our effort to meet the expected future demands for land mobile communications capacity in the largest cities while minimizing the impact on TV broadcast service. However, as discussed in paragraphs 31 and 32, this sharing proposal does not address land mobile requirements outside of the major areas and may not satisfy the total land mobile capacity needs in the two largest areas. Furthermore, the proposal does not address the potential demands of existing and

[46] The committee is composed of electronic industry members, with the National Association of Broadcasters as Secretariat, and seeks to promote standardization of advanced television systems.

new services other than land mobile that could practically and economically operate within this part of the spectrum.

40. Consequently, we are including herein a supplemental proposal to permit additional use of a portion of the UHF-TV band by expanding the scope of services that may be provided by television licensees. By broadening the communications permitted and establishing well defined interference rules, we propose to allow full service and low power television broadcast licensees on certain channels to decide on their own initiative the types of communications offered on their assignments. Licensees could choose, for example, to distribute video entertainment, provide point-to-point communications (*e.g.*, STL's), land mobile communications, or a combination of these.

41. Authorizing flexible spectrum usage on these channels would, in effect, shift a portion of spectrum usage decisions to individual licensees. It is our tentative belief that such flexible usage would provide an efficient mechanism for adjusting our general allocation plans to locally varying requirements, because local operators will be in an excellent position to evaluate local demand for communications services and have an incentive to act quickly to meet those demands. We, therefore, believe that allowing licensees more flexibility in choosing services will serve the public interest.

42. Communications services provided under this flexible allocation structure would be classified as either broadcasting, common carrier or "general" and would be subject to the same non-technical, service-related regulations normally applied to those categories of service.[47] Licensees would also be required to submit technical data and other information necessary to verify compliance with applicable rules.

43. Our experience to date with flexible spectrum usage in the broadcast services has been limited to secondary and ancillary services where the primary services provided by licensees remain unchanged. This would not be the case under the instant proposal. Therefore, we have kept its scope modest to allow us to fully assess its value as a spectrum allocation tool. We are proposing to grant flexibility only to existing and future full service and low power television broadcast licensees authorized on channels 50 to 59 (686-746 MHz).[48] We have selected these particular channels to avoid any potential conflict with our land mobile sharing proposal. These channels are the only contiguous group of ten

[47] Used here the term "general" refers to any service which is not classified specifically as broadcasting or common carrier. Any communications service in support of lawful activities and any system design would be permitted, excluding airborne or satellite-borne transmitters, that meet the proposed technical limits.

[48] A footnote would be added to the allocation table in § 2.106 indicating the broader range of permissible uses on these channels and any limitation applicable near the borders due to international agreements.

that are neither already allocated nor proposed for land mobile sharing. A ten channel block is a sufficiently large allocation to provide some flexible communications capacity in all markets, but small enough to be manageable in the event of unforeseen technical or other problems.

44. The protection afforded broadcast licensees would not be altered by this flexibility rule. Thus, for example, LPTV authorizations would still be secondary to full service TV stations regardless of the services offered. Also, to the extent licensees continued to provide some broadcast services, they would be required to abide by the applicable Part 73 rules, except to the extent such rules conflict with the exercise of technical and service flexibility.

45. To realize the benefits of flexibility it is important that licensees be free to select services without being unduly restricted or influenced by the Commission. In particular, our licensing policies should be neutral to the type of service proposed or provided. Thus, we propose not to consider service type as an issue in any comparative evaluation of assignments on these channels, both in renewals and in issuing new licenses.

46. Licensees who operate under the flexibility option would, at license renewal time, be judged based on overall performance with no preference given to any particular service. Also, the standards used to evaluate performance would be applied independently to each service category as are relevant to the type of service. Thus, a standard that is relevant only to broadcast performance would not be used to judge a licensee's performance in providing other services, such as land mobile.

Interference Rules For Flexible Operations

47. Our proposed rules would include a number of technical and geographic restrictions on flexible operations designed to prevent interference conflicts. Because of the flexibility to be afforded licensees under this proposal, the interference rules would be somewhat different from those proposed for land mobile sharing. First, we would require that all transmitters operated by a licensee under the flexibility option be confined within a defined geographical area which we would refer to as the licensee's flexible service area. The flexible service area for full service licensees would consist of all of the area within a licensee's calculated maximum facility 64 dBu contour[49] excluding any area within the distances specified in Table IV of Section 73.698 from other full

[49] Service contours are established by using the F(50,50) propagation curves. The service contour for flexible operations by a full service station would be its 64 dBu contour calculated using the maximum power and antenna height permitted in Part 73; for a low power station, the service contour would be its 74 dBu contour calculated using actual power and antenna height.

service stations on adjacent or taboo channels.[50] We have chosen to use maximum rather than actual facilities to make flexible service areas as large as possible within the confines of our current channel allotment policies. This will enable licensees to reach communities that would otherwise not be served. In the case of low power stations, the flexible service area would be bounded by the station's actual 74 dBu contour and exclude areas within the 74 dBu contours of adjacent and taboo channel[51] low power stations. Low power licensees would not be required to exclude areas overlapped by full service stations' protected contours since all low power operations are secondary to those of full service licensees in the event of interference.

48. Full service licensees wishing to operate under flexibility would be required to exclude only those overlap areas of other full service stations licensed prior to the initiation of flexible operation. The same rule would apply among low power licensees. In both cases (*i.e.*, full and low power), extension of the flexible service area to include protected overlap areas of other stations would be permitted if the affected licensees agree in writing.

49. Licensing of new full service and low power stations on these channels would be carried out in accordance with existing rules. Thus, full service stations would be authorized only on those channels and at locations specified in Section 73.606(b). Also, the protected contours of full service stations referenced in our low power licensing rules in Section 74.705 would be based on the full service station's actual rather than maximum facilities. Low power stations located within the maximum facility contours of protected full service stations would be affected only in the event of interference. This is consistent with the secondary status of low power stations and is the policy that now applies if a full service station increases its facilities and causes interference to, or receives interference from, a previously licensed low power station.

50. In addition to the geographical restrictions on flexible operations, we would require that the calculated aggregate field strength of all fixed transmitters operated within the flexible service area of a licensee be maintained below the following levels at the indicated contours:[52]

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[50] The protected taboo channels for full service station are ±2, ±3, ±4, ±5, +7, −14, −15 channels removed from the licensee's channel.

[51] The protected taboo channels in the low power case are +7, −14, and −15 channels removed from the licensee's channel.

[52] To verify compliance, a licensee proposing to operate one or more fixed transmitters would be required to submit to us a map showing the calculated aggregate field strength produced by those transmitters at specified intervals along the indicated contour. This information would be required each time a new fixed transmitter is added or removed or when changes are made in system design that affect field strength.

For full service licensees:	
At licensee's own maximum facility 64 dBu contour	64 dBu
At the maximum facility 64 dBu contours of adjacent channel full service stations	64 dBu
At the maximum facility 64 dBu contour of co-channel full service stations	19 dBu
For low power licensees:	
At licensee's own actual 74 dBu contour	74 dBu
At the maximum facility 64 dBu contours of co-channel full service stations	19 dBu
At the 74 dBu contours of co-channel low power stations	29 dBu

51. The co-channel protection proposed here is 5 dB greater than proposed above for land mobile sharing. While a 40 dB protection ratio has been found to be adequate for land mobile sharing, we believe the more conservative ratio is warranted here because of the wider range of services and system designs to be permitted. However, greater field strengths would be allowed at the contours of protected co-channel stations if the licensees of affected stations agree in writing.

52. Field strength calculations would utilize the propagation curves in Section 73.699.[53] For multiple fixed transmitters, we would define the aggregate field strength as the square root of the sum of the squares of the field strengths of the individual transmitters.[54] The power used in these calculations would be each transmitter's *peak* radiated power in the relevant direction, increased by a power adjustment factor to account for the emission's location within the channel. This adjustment factor "A" (in dB) is calculated using the following equations, where f is the frequency separation (in MHz) from the lower edge of the channel to the center of the emission:

$A = -48f + 60$	for	$0 \leq f < 1.25$
$A = 0$	for	$1.25 \leq f < 5.75$
$A = 240f - 1380$	for	$5.75 \leq f < 6.00$

53. The effect of the power adjustment factor is to reduce the permissible power in emissions near the channel edge to approximate the power roll-off that occurs within a standard television emission at frequencies below the visual carrier and above the aural carrier.

54. The field strength rule and its associated power adjustment factor would apply to fixed transmitters only. We are not proposing them for mobiles because of the difficulty in estimating the field strength of

[53] Calculations of field strength at the contours of co-channel stations would use the F(50,10) curves. All other calculations would use the F(50,50) curves.

[54] Aggregate field strength is used here to avoid imposing a maximum power limit on fixed stations and thereby reducing licensee technical flexibility. In the land mobile sharing proposal, because of the narrower range of system designs contemplated, a power limit is reasonable and obviates the need for more complex aggregate field strength calculations.

moving transmitters which could be used in large numbers. Also, as a practical matter, mobiles normally operate with less power than fixed transmitters and their operating range is practically limited by the facilities of their associated base station. Therefore, if we specify a suitably low output power limit for mobiles, restrict their operation to within a licensee's flexible service area, and maintain the facilities of fixed stations as described above, the interference potential of mobiles, even in large numbers, should be reduced to an acceptable level without the need for field strength calculations. Consequently, we are proposing to limit mobile transmitters to a maximum of 100 watts peak output power in lieu of the more detailed power and field strength limits discussed above for fixed transmitters.

55. The proposed power limits apply only to in-band emissions. To prevent excessive out-of-channel emissions by flexible operations, we propose to require that no more than 0.5% of the power in any emission fall either above or below the channel. To comply with this rule, licensees would have to take into account not only the frequency spread of the emission but also the frequency tolerance of the transmitter.[55] This rule would apply both to mobile and fixed transmitters. Transmitters which are type accepted for standard television service and which are positioned normally within the channel would be considered automatically to comply with this out-of-band emission limit.

56. Subject to these proposed technical rules, there would be no limit on the number, location or elevation[56] of fixed transmitters or the number of mobiles that could be operated within a flexible service area. However, operation of any transmitters outside the flexible service area would not be permitted.

Notification of Facilities and Services

57. We propose that we be notified at least 30 days prior to implementation of any new or modified transmitting facilities (transmitters and antennas) or of any new services to be operated under the flexibility option.[57] We would likewise require notice of transmitters taken out of service or of services that are discontinued.

58. Because of the potential for large numbers of mobiles and portables, we would take special precautions to reduce the risk of interference that might be caused by either intentional or unintentional

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[55] For example, at 700 MHz a frequency tolerance of .0005% would add 3.5 kHz to the required frequency separation between the transmitter's emission and the channel edges.

[56] It may be necessary to place a maximum limit on antenna height because of the difficulty of predicting propagation effects at very high elevation.

[57] The usual prior FAA notifications of antenna structures required under Part 17 would also apply here.

rule violations. In particular, we would require that all such transmitters be type accepted to verify compliance with the maximum 100 watt power limit and to ensure that the design is such that the frequency range of operation, once set for a particular licensee's channel, could not be changed with controls that are readily accessible to the user. Requiring type acceptance would also simplify the notification procedure for mobiles and portables by avoiding the need for detailed technical data such as required for fixed transmitters.

59. For mobile facilities the only data we would require would be the number of units to be put into service, manufacturer's name, type acceptance number and the specific frequencies of operation. How close to the channel edge a mobile could operate without violating our proposed out-of-band limit would depend upon its emission bandwidth and frequency tolerance. Licensees would make these calculations and submit the data to us as verification of compliance with the rules.

60. In notifying fixed transmitting facilities, licensees would be required to submit sufficient technical data and calculations to verify compliance with the aggregate field strength limit. Even though the rules would require that the field strength limits not be exceeded at any point on the protected contours, for purposes of notification we would require that calculations be made only at ten equally spaced intervals around the flexible service contour and at the closest point on each protected co-channel contour within 200 miles of the licensee's flexible service contour. Other data required for fixed transmitters would include manufacturer's name, model number, rated output power, operating frequency, frequency tolerance, modulation type, emission profile, and antenna location, elevation, orientation and pattern.

61. Along with the technical information, licensees would be required to describe and classify the services to be provided under the flexibility option. All services would be classified as either broadcasting, common carrier or general. Evidence of rule compliance and other documents normally required in connection with these service categories (*e.g.*, State common carrier certificates) would be filed along with the notification. Absent any notice from us to the contrary, operation of the notified facilities and services would be permitted to commence at the end of the 30 day period.

Service-Related Regulation

62. As indicated, services provided under flexibility would be regulated according to their classification. Subject to our review, applicants would make the initial service classifications in accordance with accepted

definitions.[58] Services classified as common carrier would be subject to appropriate State and Federal regulation. Broadcasting services would be subject to the same non-technical regulation as existing broadcasting services. Services classified as neither common carrier nor broadcasting would be classified as general and would not normally be subject to service-related regulation.

63. Any broadcasting service provided by licensees on these channels would be subject to the usual service-related regulations and statutory requirements previously applicable to those licensees. However, the only technical standards that we would apply to broadcasting operations are those related to interference control, as discussed above. Licensees no longer providing any broadcast service would no longer be eligible to operate in the broadcast auxiliary service. Obviously, non-broadcast operation would not be subject to cable television must-carry provisions.

Additional Flexibility Options

64. The rules we have proposed would give a considerable degree of flexibility to low and full service television broadcast licensees to explore a variety of services and system designs not permitted under existing rules. However, a licensee's options would still be limited to the existing channel assignment and service area. There would be no provision for licensees to acquire bandwidths in excess of 6 MHz nor to extend their coverage areas beyond their presently defined maximum facility Grade B contours. These restrictions could hinder the development of services requiring regional or national coverage and technologies such as high definition television potentially requiring bandwidths wider than a standard television channel. Commenters are therefore invited to discuss the need for additional flexibility and to suggest additional measures to increase flexibility beyond what we have proposed. One possibility might be to allow licensees to exchange channels or move their service areas by coordinating with other licensees who might be affected. We might also consider allowing a single licensee to acquire two or more channels, adjacent or otherwise, in the same market for technically enhanced television service or some other service requiring a wider bandwidth.

Legal Issues

65. The issue has been raised as to whether *Ashbacker* and subsequent cases could require that the Commission entertain competing applications and conduct comparative hearings whenever an existing

[58] The generally accepted definition of broadcasting service is given in Section 2.1 of our Rules. For a definition of common carrier service we would rely on the *NARUC I* guidelines. See, *National Association of Regulatory Utility Commissioners* v. *F.C.C.*, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976).

authorization is being modified to permit significantly expanded uses.[59] We seek comment on whether allowing existing licensees to, at their option, exercise additional operational and technical flexibility in the way they use their assignments would necessarily require the acceptance of competing applications and comparative hearings. However, for the reasons discussed below, our preliminary view is that as a matter of law we need not, and that as a matter of policy we should not, entertain competing applications in these cases.

66. First, the *Ashbacker* line of cases is not precisely on point when applied to the instant proposal. That is, such cases generally involve already filed mutually exclusive applications and they have never been applied in either an allocation or a rule making.

67. Secondly, in a series of recent actions, we have established the principle of flexible spectrum usage at the licensee's option, without consideration of accepting competing applications. See, for example, our TV auxiliary broadcast, FM-SCA, teletext, and TV stereo proceedings[60] where we authorized *existing* as well as new licensees to increase use of their assignments and to utilize excess capacity for non-broadcast purposes. And as part of the reallocation of a portion of the ITFS spectrum, we permitted remaining ITFS assignments to be used for non-instructional purposes.[61] Further, we recently authorized existing and new private microwave licensees to sell capacity on their systems.[62] This issue was also treated in our recent proposal to permit exchanges between commercial and non-commercial television stations.[63] We there tentatively concluded that it would not be in the public interest to entertain competing applications, stating:

> [d]espite the hearing requirements of *Ashbacker*, the law is clear that the Commission may promulgate rules limiting applicants' eligibility to apply for channels if, in the Commission's judgment, such action would promote the public interest, convenience and necessity. *Storer Broadcasting* v. *F.C.C.*, 351 U.S. 192 (1956); *Malrite of New York, Inc.*, F.C.C. 84-338, released July 31, 1984. Applications violating such eligibility requirements may be dismissed without a hearing.[64]

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[59] See, *Ashbacker Radio Corp.* v. *F.C.C.*., 326 U.S. 327 (1945); *New South Media Corp.* v. *F.C.C.*, 685 F.2d 708, 714-715 (D.C. Cir. 1982); *Citizens Communications Center* v. *F.C.C.*, 447 F.2d 1201, 1210-11 (D.C. Cir. 1971); *Community Telecasting Co.* v. *F.C.C.*, 255 F.2d 871, 893 (D.C. Cir. 1958).

[60] See, *Report and Order* in Docket 81-794 (TV Auxiliary Broadcast), 48 *Fed. Reg.* 17081 (April 21, 1983); *First Report and Order* in Docket 82-536 (FM SCA's), 48 *Fed. Reg.* 28445 (June 22, 1983); *First Report and Order* in Docket 81-741 (teletext), 48 *Fed. Reg.* 27054 (June 13, 1983); and *Second Report and Order* in Docket 21323 (TV Stereo), 49 *Fed Reg.* 18,000 (April 27, 1984).

[61] *Report and Order* in Docket 80-112 (MMDS/ITFS), 48 *Fed. Reg.* 33,873 (July 26, 1983).

[62] *Report and Order* in Docket 83-426, 50 Fed. Reg. 1338 (April 4, 1985).

[63] *Notice of Proposed Rulemaking* in Docket 85-41, FCC 85-73, released March 8, 1985.

[64] *Id.* at para. 9.

68. Finally, from a policy standpoint, it seems clear that the possibility of a comparative hearing would discourage existing licensees from electing to provide non-broadcast services on their assignments. Comparative hearings would reduce the expected value of future non-broadcast earnings by interjecting an additional element of uncertainty (*i.e.*, the outcome of the hearing) into the business calculus. Only in those cases where there is the possibility of substantially higher profits from non-broadcast operations is it likely an existing licensee would risk losing a comparative hearing.

69. Moreover, comparative hearings impose significant costs and delays upon the participants. Because the possibility of a comparative hearing would increase the costs of switching from a broadcast to a non-broadcast service, licensees would be less inclined to do so even if they were confident they could win a hearing. Therefore, there are strong policy reasons for avoiding *Ashbacker* type hearings.

Proposals

70. Accordingly, it is proposed to amend Part 2 of the Commission's Rules and to:

a. Provide for the sharing of additional UHF TV channels as set forth in paragraph 29 in each of the eight urban areas named. This sharing plan is based on 40 dB co-channel and 0 dB adjacent channel TV protection criteria and on computed grade B contours for currently authorized TV station parameters.

b. Provide for flexible spectrum usage for existing and future full service and low power television broadcast licensees authorized on channels 50 to 59.

During this proceeding we will terminate the procedure of reviewing all low power TV applications within 100 miles of the ten largest U.S. metropolitan areas and we will continue to process all pending applications. However, no final low power construction permits will be issued that conflict with the sharing set forth herein, pending completion of this proceeding.

71. In addition to the issues which have been specifically addressed in the *Notice*, any other comments related to the subject of further geographical sharing of broadcast spectrum by the private land mobile services or to the subject of flexible spectrum use are invited.

Regulatory Flexibility Analysis

72. Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds as follows:

I. Reasons for Action:

This proposal would provide additional frequencies for use by the private land mobile radio services. This will increase the number of radio channels available to applicants and licensees in these services.

II. Objective

The Commission is advancing this proposal to accommodate continued growth in the private land mobile radio services.

III. Legal Basis:

The proposed action is authorized under Section 4(i), 303(f), 303(g), 303(r), and 331(a) of the Communications Act of 1934, as amended, which authorize the Commission to make such rules and regulations as may be necessary to improve the efficiency of spectrum use and to increase interservice sharing opportunities between private land mobile services and other services.

IV. Description, Potential Impact and Number of Small Entities Affected:

The release of additional spectrum to private land mobile radio services will result in increased opportunities for radio users and manufacturers, some of which are small businesses. However, land mobile use of the channels proposed may reduce the number of channels on which small businesses could establish TV stations. Any impact would be limited to the eight cities and the TV channels (plus adjacent channels) identified. The flexible use proposal would enable individual licensees to provide a wider range of local services, some of which may involve small businesses and entrepreneurs. Beyond this, we are unable to quantify the potential effects on small entities. We therefore invite specific comments on this point by interested parties. Additionally, IT IS ORDERED That the Secretary shall serve a copy of this *Notice* on the Small Business Administration.

V. Reporting, Recordkeeping, and Other Compliance Requirements

No new requirements will be imposed.

VI. Federal Rules Which Overlap, Duplicate or Conflict With This Rule

To our knowledge, there are no other Federal rules that overlap, duplicate or conflict with those contained in the *Notice.*

VII. Significant Alternatives

A variety of sharing alternatives could be set forth based upon different cochannel and adjacent channel protection ratios between the desired television signal level and the undesired land mobile radio signal at the grade B service contour. The proposal would reduce the co-channel protection ratio from 50 dB to 40 dB. Other proposals could reduce the protection ratio by a greater or lesser amount. A great reduction would allow for additional land mobile service, but would afford lesser protection to TV service. A lesser reduction would provide less land mobile service,

but would afford greater protection to television service. We believe the sharing proposal strikes the proper balance between the two services, but comments are solicited on alternative protection ratios. As discussed in paragraph 25 alternative channels could be obtained by the repacking of UHF TV channels as a possible alternative scheme to the proposed sharing approach. This alternative was dismissed principally because of the significant impact such would have on TV licensees.

73. For purposes of this non-restricted notice and comment rule making, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rule making until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of the presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must also state by docket number the proceeding to which it relates. See generally, Section 1.231 of the Commission's Rules, 47 C.F.R. §1.231.

74. This action is taken pursuant to Sections (4i), 303(c), 303(f), 303(g), 303(r), of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 303(c), 303(f), 303(g), 303(r) and 332. Interested persons may file comments on this proposal on or before April 11, 1986 and reply comments on or before May 16, 1986. All relevant and timely comments filed in accordance with Sections 1.415 and 1.419 of our rules and regulations (47 C.F.R. §§1.415 and 1.419) will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information is placed in the public file, and provided that the Commission's reliance on such information is noted in its final decision.

75. In accordance with the provisions of Section 1.419 of the Rules and Regulations, 47 C.F.R. §1.419, formal participants shall file an original and five copies of their comments. Participants wishing each Commission-

er to have a personal copy of their comments should file an original and eleven copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy of their comments without regard to form (as long as the docket number is clearly stated in the heading). All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

76. For further information concerning this rulemaking, contact Rod Small (202) 653-8169, Victor Tawil (202) 653-8114, Gordon Godfrey (202) 632-6495, Herb Zeiler or Stuart Overby (202) 634-2443 and John Williams (202) 653-5940.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

A. Part 2 - Frequency Allocations and Radio Treaty Matters; General Rules and regulations.

1. In Section 2.106, columns 5 and 6 of the allocation table for the bands, 470-512 MHz, 512-608 MHz, and 614-806 MHz are amended as set forth below.

§2.06 *Table of Frequency Allocations*

UNITED STATES TABLE		FCC USE DESIGNATORS	
GOVERNMENT	NON-GOVERNMENT		
ALLOCATION MHZ (4)	ALLOCATON MHZ (5)	RULE PART(s) (6)	SPECIAL-USE FREQUENCIES (7)
470 - 512	470 - 512 BROADCASTING LAND MOBILE	RADIO BROADCAST (TV) (73) DOMESTIC PUBLIC LAND MOBILE (22) PRIVATE LAND MOBILE (90)	
	NG66 NG114	Auxiliary Broadcasting (74)	
	NG127 NG146		
512 - 608	512 - 608 BROADCASTING LAND MOBILE	RADIO BROADCAST (TV) (73) PRIVATE LAND MOBILE (90)	
		Auxiliary Broadcasting (74)	
	NG146		
*	*	* *	*
614 - 806	614 - 806 BROADCASTING LAND MOBILE	RADIO BROADCAST (TV) (73) PRIVATE LAND MOBILE (90)	
		Auxiliary Broadcasting (74)	
	NG30 NG43 NG146		
*	*	* *	*

2. In Section 2.106, a new footnote is added to the list of Footnotes following the Table of Frequency Allocations as follows:

§2.106 *Table of Frequency Allocations*

* * * * *

NON-GOVERNMENT

* * * * *

NG146 The frequency bands 470-512, 512-608 MHz, and 614-806 MHz are allocated for use in the broadcasting and land mobile radio services. In the land mobile services they are available for assignment in the domestic private land mobile radio services at, or in the vicinity of 8 urbanized areas of the United States, as set forth in the table below, and subject to the standards and conditions set forth in Part 90 of this Chapter, CFR 47.

Urbanized area	TV Channels
New York, N.Y.	[to be decided]
Los Angeles, CA	[to be decided]
Chicago, IL	[to be decided]
Philadelphia, PA	[to be decided]
San Francisco, CA	[to be decided]
Washington, DC	[to be decided]
Houston, TX	[to be decided]
Dallas, TX	[to be decided]

APPENDIX B

The attached tables identify the proposed full-power television facilities to be protected by private land mobile stations. Maps displaying the proposed land mobile operating areas for each urbanized area on the proposed candidate channels have been included in the docket file for this proceeding. The file is available for review in the Commission's Public Reference Room.

TELEVISION FACILITIES TO BE PROTECTED BY PRIVATE LAND MOBILE STATIONS
(PROPOSED)

URBANIZED AREA	FREQUENCIES AVAILABLE FOR LAND MOBILE USE (MHz)	TELEVISION FACILITIES PROTECTED					TV STATION SITE COORDINATES		DISTANCE FROM CITY TO TV (miles)
		TV CALL	CH. NO.	CO. CH., ADJ. CH., TABOO	TV STATION LOCATION	GRADE B (miles)	N. LATITUDE	W. LONGITUDE	
New York, NY	19 500-506	WLIW	21	IM	Garden City, NY		40-47-19	73-27-09	29
		WCDC	19	CO. CH.	Adams, MA	51	42-38-14	73-10-07	137
		WHCT	18	ADJ. CH.	Hartford, CT	32	41-45-39	72-48-08	93
	27 548-554	WNYE	25	IM	New York, NY		40-41-21	73-58-37	4
		WNYC	31	IM	New York, NY		40-44-54	73-59-10	1
		CP	26	ADJ. CH.	New London, CT	45	41-23-45	72-33-31	87
	28 554-560	WBRE	28	CO. CH.	Wilkes Barre, PA	61	41-11-01	75-52-02	102
		WTAF	29	ADJ. CH.	Philadelphia	55	40-02-26	75-14-20	82
	33 584-590								

TELEVISION FACILITIES TO BE PROTECTED BY PRIVATE LAND MOBILE STATIONS
(PROPOSED)

URBANIZED AREA	FREQUENCIES AVAILABLE FOR LAND MOBILE USE (MHz)	TELEVISION FACILITIES PROTECTED					TV STATION SITE COORDINATES		DISTANCE FROM CITY TO TV (miles)
		TV CALL	CH. NO.	CO. CH., ADJ. CH., TABOO	TV STATION LOCATION	GRADE B (miles)	N. LATITUDE	W. LONGITUDE	
New York, NY	34 590-596	WNYC	31	IM	New York, NY		40-44-54	73-59-10	1
		WMGC	34	CO. CH.	Binghampton, NY	40	42-03-38	75-56-33	136
		CP	35	ADJ. CH.	Philadelphia, PA	45	40-02-21	75-14-13	82
		WXTV	41	IF	Secaucus, NJ		40-42-22	74-00-28	3
Los Angeles, CA.	26 542-548	KMPH	26	CO. CH.	Visalia, CA	69	36-17-12	118-50-20	158
		KCET	28	IM	Los Angeles, CA		34-13-26	118-03-44	16
		KMEX	34	IF	Los Angeles, CA		34-13-35	118-03-56	16
		KWYT	22	IM	Los Angeles, CA		34-13-36	118-03-59	16
	32 578-584	KCET	28	IM	Los Angeles, CA		34-13-26	118-03-44	16
		KMEX	34	IM	Los Angeles, CA		34-13-27	118-03-44	16
		KTBN	40	IF	Santa Ana, CA		34-13-27	118-03-44	16

TELEVISION FACILITIES TO BE PROTECTED BY PRIVATE LAND MOBILE STATIONS
(PROPOSED)

URBANIZED AREA	FREQUENCIES AVAILABLE FOR LAND MOBILE USE (MHz)	TELEVISION FACILITIES PROTECTED					TV STATION SITE COORDINATES		DISTANCE FROM CITY TO TV (miles)
		TV CALL	CH. NO.	CO. CH., ADJ. CH., TABOO	TV STATION LOCATION	GRADE B (miles)	N. LATITUDE	W. LONGITUDE	
Los Angeles, CA	36 602-608	KMIR	36	CO. CH.	Palm Springs, CA	36	33-52-00	116-25-56	104
	42 638-644	KESQ	42	CO. CH.	Palm Springs, CA	34	33-51-58	116-26-02	105
	48 674-680	KTBN	40	IM	Santa Ana, CA		34-13-27	118-03-44	16
		KIHS	46	IM	Ontario, CA		34-13-37	118-03-58	16
		KOCE	50	IM	Huntington, CA		33-58-19	117-56-57	18
		KBSC	52	IM	Corona, CA		34-13-27	118-03-45	16

TELEVISION FACILITIES TO BE PROTECTED BY PRIVATE LAND MOBILE STATIONS
(PROPOSED)

URBANIZED AREA	FREQUENCIES AVAILABLE FOR LAND MOBILE USE (MHz)	TELEVISION FACILITIES PROTECTED					TV STATION SITE COORDINATES		DISTANCE FROM CITY TO TV (miles)
		TV CALL	CH. NO.	CO. CH., ADJ. CH., TABOO	TV STATION LOCATION	GRADE B (miles)	N. LATITUDE	W. LONGITUDE	
Los Angeles, CA	60 746-752	KBSC	52	IF	Corona, CA		34-13-27	118-03-45	16
		KLCS	58	IM	Los Angeles, CA		34-13-26	118-03-45	16
		KDDE	68	IF	Los Angeles, CA		34-13-36	118-03-59	16
	66 782-788								
Chicago, IL	41 632-638	WCFC	38	IM	Chicago, IL		41-53-56	87-37-23	2
		WUHQ	41	CO. CH.	Battle Creek, MI	48	42-34-15	85-28-11	121
		WSNS	44	IM	Chicago, IL		41-53-56	87-37-23	2
	47 668-674	WHME	46	ADJ. CH.	South Bend, IN	43	41-35-43	86-09-38	79

TELEVISION FACILITIES TO BE PROTECTED BY PRIVATE LAND MOBILE STATIONS (PROPOSED)

URBANIZED AREA	FREQUENCIES AVAILABLE FOR LAND MOBILE USE (MHz)	TELEVISION FACILITIES PROTECTED					TV STATION SITE COORDINATES		DISTANCE FROM CITY TO TV (miles)
		TV CALL	CH. NO.	CO. CH., ADJ. CH., TABOO	TV STATION LOCATION	GRADE B (miles)	N. LATITUDE	W. LONGITUDE	
Chicago, IL	64 770-776	WPWR	60	IM	Aurora, IL		41-52-44	87-38-10	1
		WLLA	64	CO. CH.	Kalamazoo, MI	44	42-34-41	85-26-13	123
	68 794-800	WDAI	56	IF	Gary, IN		41-33-10	87-47-09	23
		WFBN	66	IM	Joliet, IL		41-53-56	87-37-23	2
San Francisco, CA	18 494-500	KDTV	14	IM	San Francisco, CA		37-41-07	122-26-01	7
		KCSO	19	ADJ. CH.	Modesto, CA	65	38-07-07	120-43-23	95
		KTZO	20	IM	San Francisco, CA		37-41-17	122-26-07	6
		KTSF	26	IF	San Francisco, CA		37-41-12	122-26-03	6

TELEVISION FACILITIES TO BE PROTECTED BY PRIVATE LAND MOBILE STATIONS
(PROPOSED)

URBANIZED AREA	FREQUENCIES AVAILABLE FOR LAND MOBILE USE (MHz)	TELEVISION FACILITIES PROTECTED					TV STATION SITE COORDINATES		DISTANCE FROM CITY TO TV (miles)
		TV CALL	CH. NO.	CO. CH., ADJ. CH., TABOO	TV STATION LOCATION	GRADE B (miles)	N. LATITUDE	W. LONGITUDE	
San Francisco, CA	24 530-536	KTZO	20	IM	San Francisco, CA		37-41-17	122-26-07	6
		KTSF	26	IM	San Francisco, CA		37-41-12	122-26-03	6
		KQEC	32	IF	San Francisco, CA		37-45-20	122-27-05	3
	28 554-560	KCEO	28	CO. CH.	Oroville, CA	62	39-12-21	121-49-11	104
		KCMY	29	ADJ. CH.	Sacramento, CA	48	38-21-30	121-06-37	82
	34 590-596	KTSF	26	IF	San Francisco, CA		37-41-12	122-26-03	6
		KQEC	32	IM	San Francisco, CA		37-45-20	122-27-05	3
		KCBA	35	ADJ. CH.	Salinas, CA	65	36-45-22	121-30-05	87
		KVOF	38	IM	San Francisco, CA		37-41-15	122-26-04	6
		KFCB	42	IF	Concord, CA		37-53-34	121-53-53	29

TELEVISION FACILITIES TO BE PROTECTED BY PRIVATE LAND MOBILE STATIONS (PROPOSED)

URBANIZED AREA	FREQUENCIES AVAILABLE FOR LAND MOBILE USE (MHz)	TELEVISION FACILITIES PROTECTED					TV STATION SITE COORDINATES		DISTANCE FROM CITY TO TV (miles)
		TV CALL	CH. NO.	CO. CH., ADJ. CH., TABOO	TV STATION LOCATION	GRADE B (miles)	N. LATITUDE	W. LONGITUDE	
Philadelphia, PA	26 542-548	WNJS	23	IM	Camden, NJ		39-43-41	74-50-39	23
		WETA	26	CO. CH.	Washington, DC	43	38-57-49	77-06-18	125
		WTAF	29	IM	Philadelphia, PA		40-02-26	75-14-20	6
	32 578-584	WNYC	31	ADJ. CH.	New York, NY	61	40-42-43	74-00-49	80
		WHMM	32	CO. CH.	Washington, DC	46	38-57-49	77-06-18	124
		WITF	33	ADJ. CH.	Harrisburg, PA	50	40-20-45	76-52-06	95
	42 638-644	CP	35	IF	Philadelphia, PA		40-02-21	75-14-13	8
		WXTV-CP	41	ADJ. CH.	Paterson, NJ	57	40-42-43	74-00-49	80
		WPMT	43	ADJ. CH.	York, PA	53	40-01-38	76-36-00	77

TELEVISION FACILITIES TO BE PROTECTED BY PRIVATE LAND MOBILE STATIONS
(PROPOSED)

URBANIZED AREA	FREQUENCIES AVAILABLE FOR LAND MOBILE USE (MHz)	TELEVISION FACILITIES PROTECTED					TV STATION SITE COORDINATES		DISTANCE FROM CITY TO TV (miles)
		TV CALL	CH. NO.	CO. CH., ADJ. CH., TABOO	TV STATION LOCATION	GRADE B (miles)	N. LATITUDE	W. LONGITUDE	
Philadelphia, PA	46 662-668	WBFF-CP	45	ADJ. CH.	Baltimore, MD	50	39-17-13	76-45-16	97
		WNJU-CP	47	ADJ. CH.	Linden, NJ	60	40-42-43	74-00-49	80
Washington, DC	30 566-572	WVIR	29	ADJ. CH.	Charlottesville, VA	48	37-59-00	78-28-54	102
		WWPB	31	ADJ. CH.	Hagerstown, MD	49	39-39-04	77-58-15	73
	35 596-602	CP	35	CO. CH.	Philadelphia, PA	45	40-02-21	75-14-13	123
		WRLH	35	CO. CH.	Richmond, VA	56	37-30-22	77-42-03	103
	36 602-608	WHMM	32	IM	Washington, DC		38-57-49	77-06-18	7

TELEVISION FACILITIES TO BE PROTECTED BY PRIVATE LAND MOBILE STATIONS
(PROPOSED)

URBANIZED AREA	FREQUENCIES AVAILABLE FOR LAND MOBILE USE (MHz)	TELEVISION FACILITIES PROTECTED					TV STATION SITE COORDINATES		DISTANCE FROM CITY TO TV (miles)
		TV CALL	CH. NO.	CO. CH., ADJ. CH., TABOO	TV STATION LOCATION	GRADE B (miles)	N. LATITUDE	W. LONGITUDE	
Washington, DC	39 620-626	WHMM	32	IF	Washington, DC		38-57-49	77-06-18	7
		CP	38	ADJ. CH.	Seaford, DE	49	38-43-36	75-41-33	72
		WLVT	39	CO. CH.	Allentown, PA	41	40-33-58	75-26-06	142
Houston, TX	16 482-488	CP	14	IM	Houston, TX		29-33-17	95-28-35	16
	35 596-602								
	41 632-638	KHTV	39	IM	Houston, TX		29-34-06	95-29-57	16
	63 764-770	KZEI	67	IM	Alvin, TX		29-27-57	95-13-23	22
	69 800-806								

TELEVISION FACILITIES TO BE PROTECTED BY PRIVATE LAND MOBILE STATIONS
(PROPOSED)

URBANIZED AREA	FREQUENCIES AVAILABLE FOR LAND MOBILE USE (MHz)	TELEVISION FACILITIES PROTECTED					TV STATION SITE COORDINATES		DISTANCE FROM CITY TO TV (miles)
		TV CALL	CH. NO.	CO. CH., ADJ. CH., TABOO	TV STATION LOCATION	GRADE B (miles)	N. LATITUDE	W. LONGITUDE	
Dallas/FT Worth, TX	17 488-494	KTXA	21	IM	Fort Worth,TX		32-35-22	96-58-10	17
	35 596-602	KMLT-CP	35	CO. CH.	Marshall, TX	52	32-35-47	94-49-16	116
	41 632-638	KRLD	33	IF	Dallas, TX		32-35-22	96-58-10	17
		KXTX	39	IM	Dallas, TX		32-35-07	96-58-06	17
		KLTJ	49	IF	Irving, TX		32-35-22	96-48-05	14
	62 758-764								
	66 782-788	KDIA	58	IF	Dallas, TX		32-35-22	96-58-10	17

APPENDIX C

The attached tables indicate the number of pending low power television and television translator applications proposing operation on a candidate land mobile channel and first adjacent channel within a 50-mile radius of each of the urbanized areas.

PENDING LOW POWER TELEVISION APPLICATIONS
AFFECTED BY PROPOSED LM/TV SHARING PLAN

URBANIZED AREA	CHANNEL	No./CITY	N0./SURROUNDING AREA (within 50 miles)
New York NY	19	1 *	
	27	–	5 (Hempstead, NY - 2, Newark, NJ - 1, Pompton Lakes, NJ - 1, Princeton, NJ - 1)
	33	–	5 (Plainview, NY - 1, Atlantic Highlands, NJ - 1, Dover, NJ - 1, Hazlet, NJ - 1, Darien, NJ - 1)
Los Angeles CA	25	–	2 (Long Beach, CA - 1, Van Nuys, CA - 1)
	26	3	11 (Anaheim, CA - 2, Beverly Hills, CA - 1, Long Beach, CA - 5, Santa Ana, CA - 1, Santa Monica, CA - 1, West Hollywood, CA - 1)
Chicago IL	42	1	10 (Naperville, IL - 2, West Chicago, IL - 8)
	63	–	1 (Hammond, IN - 1)
	68	2	1 (Arlington Heights, IL - 1)
	69	–	3 (Aurora, IL - 2, Hammond, IN - 1)
San Francisco CA	23	–	1 (Walnut Creek, CA - 1)
	24	–	4 (Palo Alto, CA - 2, San Jose, CA - 2)

(NOTES AT END OF TABLE)

PENDING LOW POWER TELEVISION APPLICATIONS AFFECTED BY PROPOSED LM/TV SHARING PLAN

URBANIZED AREA	CHANNEL	No./CITY	N0./SURROUNDING AREA (within 50 miles)
Philadelphia PA	25	–	3 (Spring City, PA - 3)
	27	–	2 (Princeton, NJ - 1, Trenton, NJ - 1)
	42	32	9 (Camden, NJ - 7, Cherry Hill, NJ - 1, Elkins Park, PA - 1)
	46	–	2 (Allentown, PA - 2)
Washington DC	30	–	48 (Baltimore, MD - 34, Towson, MD - 1, Dale City, VA - 1, Fairfax, VA - 7, Manassas, VA - 4, Warrenton, VA - 1)
Houston TX	36	1	
	42	2	1 (Alvin, TX - 1)
	64	2	1 (Galveston, TX - 1)
	69	5	1 (Jacinto City, TX - 1)
Dallas TX	61	–	5 (Fort Worth, TX - 5)
	65	–	3 (Fort Worth, TX - 3)
	66	13	
	67	–	1 (Irving, TX - 1)

Notes: The chart indicates the numbers of pending low power television and television translator applications proposing operation on the candidate land mobile channels (and first adjacent channels) in the central cities (Column Three) and additionally, within 50 miles of the reference center of the urbanized area (Column Four). As many as 50 – 75 other applications proposing locations at greater distances possibly could be affected because of the restrictions on LPTV signal strength at the land mobile protected contour.

The numbers of affected applications may not be indicative of the demand for LPTV stations in the major urban areas because these areas have been subject to an application filing freeze for the past four years.

The channel 19 application of National Innovative Programming was chosen as the tentative selectee in lottery L85-488, held on April 29, 1985.

Separate Statement
of
Commissioner James H. Quello

In re: Further Sharing of the UHF Television Band by Private Land Mobile Radio Services.

I strongly support the Commission's creation of a government-industry advisory committee to help ensure that our sharing proposal does not result in interference to UHF television service. I look forward to carefully reviewing that committee's technical analysis and conclusions as we consider this issue.

I also believe it is important for the Commission to consider the impact of spectrum sharing on opportunities for low power television in these markets. At this time, it appears that permitting spectrum sharing as proposed here would completely preclude low power service in a few major cities. The Commission gave notice in the *Low Power Report and Order*[1] that it would be concerned about unduly diminishing the spectrum available for low power television, and therefore I believe it is essential that we consider the impact of these sharing proposals on major market low power service so that we can make an informed decision on this issue.

Finally, I want to encourage commenters to consider whether and in what ways the proposed sharing of this spectrum could help ensure that the communications needs of the public safety community will be fully met. The need for careful planning in this area has increased dramatically as the spectrum previously available for land mobile expansion has been utilized. Congress has directed the Commission to consider public safety needs in any allocation decision involving land mobile spectrum,[2] and early input from affected public safety organizations could be important to assuring that the Commission maximizes the value of this spectrum for these services.

STATEMENT
OF
COMMISSIONER HENRY M. RIVERA

RE: Notice of Proposed Rulemaking of Further Sharing of the UHF Television Band by Private Land Mobile Radio Services

This Notice of Proposed Rulemaking (NPRM) proposes to reallocate UHF spectrum to the land mobile service in large markets. Given the Private Radio Bureau's projected growth for land mobile radio needs, it

[1] *Report and Order*, Broadcast Do. No. 78-253, 47 Fed. Reg. 21468, 21479 (1982).

[2] Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, Sec. 9, 97 Stat. 1467 (1983).

seems plain that we should do something to determine how to accommodate this growth. Soliciting comment on the options proposed in this NPRM is a reasonable "something" to do toward that end. For that reason, I can support this item. Nevertheless, this NPRM is deficient because it fails to reflect the considerable harm this proceeding will have upon the low power television (LPTV) service. By failing to acknowledge that harm, the Commission unwisely sets a course that fails to explore technical alternatives that could mitigate that harm.

Initially, the item understates the demand by LPTV interests for UHF spectrum. In the eight markets identified in this NPRM, parties interested in broadcasting have been precluded from applying for new channels for a number of years because both the VHF and UHF television bands have been saturated. LPTV provided the first new television broadcast opportunities in these markets. The proposals in this item will eliminate virtually all pending LPTV applications. They will also preclude future opportunities for LPTV for as far as 100 miles from the designated cities.

The NPRM appears to take the position that this damage to LPTV is minimal because there are few pending LPTV applications in the affected markets (and, therefore, little interest in LPTV). However, the item is somewhat disingenuous in this regard. Implementation of the LPTV service has moved so slowly that the Commission cannot accurately gauge the level of interest for LPTV in these eight cities based on the number of pending LPTV applications. The partial freeze prior to formal initiation of the service[1], the television market freeze[2], and the still-in-effect general freeze[3] all prohibited the filing of applications in these cities. The small number of pending applications merely reflects these filing prohibitions — not a lack of interest. Given the astronomical prices for television stations in these markets, there is little question that the interest level in additional broadcast opportunities is high. All of which is to say that land mobile radio is not the only unsatisfied spectrum demand in these markets. Many potential LPTV applicants have waited patiently since 1981 to file applications, only to find that now the Commission has slammed the door in their faces without so much as acknowledging their existence and their unsatisfied need for spectrum.

Because it has seriously understated the impact of these proposals on the LPTV service, the Commission is in the unfortunate posture of having begun a proceeding that will all but preclude LPTV in the eight largest geographic markets without considering ways to mitigate that consequence. At a minimum, the NPRM should have solicited comments on various ways of liberalizing the LPTV technical rules to create new LPTV

[1] *Order Imposing Freeze*, 46 Fed. Reg. 2602 (May 11, 1981).

[2] *Report and Order*, Docket No. 82-107, 47 Fed. reg. 21468 (May 18, 1982).

[3] *Order at paragraph 46*, FCC 83-423 (September 15, 1983).

filing opportunities to replace those eliminated by the proposed reallocation.[4] Hopefully, the Commission will rectify this shortcoming during the long comment period afforded in this NPRM by initiating a rulemaking proceeding to address this concern.

[4] There are several practical changes in the LPTV technical rules that could be investigated during this proceeding for the purpose of providing replacement spectrum for LPTV in the affected markets. For example, the LPTV-to-full power UHF television intermodulation (IM) taboos could be eliminated without cognizable interference to the protected service area of full service television stations. The existing LPTV-to-land mobile co-channel 52 dBu signal strength limit at the land mobile protected contour could be reduced and the LPTV-to-land mobile adjacent channel 76 dBu signal strength limit at the land mobile protected contour eliminated without cognizable interference to land mobile radio reception. The proposed "interim protection standards" for LPTV's stations operating from high sites seems unnecessarily conservative given the absence of any history of interference problems between existing translators and land mobile facilities on UHF channels 14 through 20 using the current protection standards. Furthermore, adjacent channel LPTV stations could operate within land mobile service areas with proper coordination between LPTV transmitter and land mobile base stations and mobile relay sites. While the resulting LPTV opportunities would suffer from occasional transitory interference to reception from land mobile unit stations, this slightly degraded service may be infinitely preferable to no LPTV service in these markets at all. While comments on these and similar technical adjustments could have gone a long way towards limiting the damage this NPRM does to the nascent LPTV service, the NPRM unfortunately understates the impact of the NPRM's proposals and ignores the effects of the proposed changes.

Political Candidate, Station Employee

Petition for declaratory ruling denied. Where a legally qualified candidate for public office appears on a bona fide newscast in the capacity of a news reporter, rather than as the subject of the news, such appearances are subject to the "equal opportunities" requirement of Section 315.

—*William H. Branch*

FCC 85-447

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Request by
William H. Branch
for
Declaratory Ruling

MEMORANDUM OPINION AND ORDER

Adopted: August 5, 1985; Released: August 12, 1985

BY THE COMMISSION: COMMISSIONERS RIVERA AND PATRICK CONCURRING IN THE RESULT.

1. The Commission has before it a request for a declaratory ruling involving Section 315(a) of the Communications Act of 1934, as amended, filed by William H. Branch.[1]

[1] On August 10, 1984, Branch filed a request for an expedited declaratory ruling with respect to the issues raised herein. Shortly thereafter, he informed the Commission that an expedited ruling would not be necessary since he no longer intended to run as a candidate for the Loomis, California, town council. On August 30, 1984, a memorandum in support of the petition was filed by Michael A. Hackard on behalf of Branch. By letter, which the Commission received September 17, 1984, Branch requested that the Commission delay a decision in this matter until after the November 6 election.

On October 26, 1984, the National Association of Broadcasters (NAB) filed a statement in partial support of Branch's request, asking that the Commission seek public comment on this matter. Because the legislative, judicial, and Commission precedents are clear with respect to the issues raised herein, we do not feel public comment is necessary.

On October 29, 1984, the American Legal Foundation (ALF) filed an opposition to the Branch petition. The gravamen of ALF's arguments is that Branch's request would

Request

2. Branch states that he is a news reporter at television station KOVR, Stockton, California, and that he had intended to run in the November 1984 Loomis, California, town council election. Had Branch become a legally qualified candidate for public office during the general election and continued his on-the-air appearances, pursuant to the Commission's interpretation of Section 315, KOVR would have been required to provide "equal opportunities" to his opponents. KOVR informed Branch that it would not provide such time to his opponents. Instead, he would have been required to take a leave of absence for the duration of the campaign, with no assurance of being rehired after the election. Branch requests that the Commission declare the "equal opportunities" provision of Section 315 to be unconstitutional. He also argues that the Commission's interpretation of Section 315 violates first amendment free speech objectives and is overbroad in its application. Branch asserts that the legislative history of the 1959 amendments clearly indicates that the Commission should modify its interpretation of Section 315 and exempt the appearances of a newscaster/candidate from the "equal opportunities" provision of Section 315.

Discussion

A. Case and Legislative History

3. Section 315(a) requires that if broadcasters permit a legally qualified candidate to "use"[2] their facilities, they must afford equal opportunities to the candidate's opponents. The purpose of Section 315, originally Section 18 of the Radio Act of 1927 (44 Stat. 1162), is to assure equality of treatment to candidates for public office. 67 Cong. Rec. 12502 (1926); 105 Cong. Rec. 14439, 14451 (1959). In 1959, the Commission held that Section 315 required "equal opportunities" to be afforded to the opponents of those Chicago mayoral candidates who appeared on television newscasts. *Telegram to CBS, Inc. (Lar Daly),* 18 RR 238 (1959), *recon. denied,* 26 FCC 715 (1959). Congress reacted to that ruling by amending Section 315 to exempt four categories of news programming.[3]

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violate the basic congressional objective in enacting Section 315(a) of the Communications Act — that is, to ensure that all candidates for public office are treated similarly in their use of broadcast facilities.

[2] In general, any appearance by a legally qualified candidate on a nonexempt program, by voice or picture, where the candidate's participation is such that he will be identified by members of the viewing or listening audience, constitutes a "use." *Law of Political Broadcasting and Cablecasting,* ___ FCC 2d ___ 1984); H. R. 92-65, 92d Cong., 1st Sess. 9 (1971).

[3] Section 315(a) of the Communications Act states in pertinent part:

Appearance by a legally qualified candidate on any —

The purpose of the amendment is set forth clearly in the Senate report, which states:

> If the present position of the Federal Communications Commission with regard to Section 315 remains unchanged, the Committee feels that this would tend to dry up meaningful radio and television coverage of political campaigns. [S. Rep. No. 562, 86th Cong., 1st Sess. 10 (1959).]

The amendment created situations where broadcasters need not provide absolute equality of treatment to candidates appearing on exempt programs. In order to minimize any unfair advantage which could result from the amendment, Congress indicated that the exemptions would not apply where candidates initiated the coverage themselves. While discussing the proposed amendments on the Senate floor, Senator Pastore, chairman of the subcommittee which drafted the amendments, stated:

> That is correct, provided he did not *initiate* the newscast, provided he did nothing affirmatively to advance his own candidacy — in other words, if his appearance was part of the *information* given to the public as a newscast. [*Id.* at 14446 (emphasis added).]

On the House side, Congressman Brown stated with regard to a candidate's exempt appearance:

> He cannot put on a program of his own to help his own candidacy. Instead, it must be newsworthy, but it must be instigated by the station or by the news reporters that interview him. [105 Cong. Rec. 16225 (1959).]

In addition to specifying that candidates were not to initiate exempt appearances, the legislative history of the 1959 amendments shows that Congress did not intend that candidates have control over the "format and production" of these appearances. S. Rep. No. 562, 86th Cong., 1st Sess. 11 (1959). The Senate Report stated:

> It should be noted that the programs that are being exempted in this legislation have one thing in common. They are generally news and information-type programs designed to disseminate information to the public and in almost every instance the format and production of the program is under the control of the broadcast station, or the network in the case of a network program. [S. Rep. No. 562, 86th Cong., 1st Sess. 11 (1959).]

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(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be a use of a broadcasting station within the meaning of this subsection.

The year after the news exemptions were enacted, the Commission ruled that appearances on newscasts by a weatherman who was a legally qualified candidate were not subject to the "equal opportunities" provision of Section 315 by virtue of their falling into one of the four exempt news categories. *KWTX Broadcasting Co.*, 40 FCC 304 (1960), *aff'd sub nom. Brigham v. FCC*, 276 F.2d 828, 830 (5th Cir. 1960). Subsequently, the Commission recognized that this decision was inconsistent with the legislative history of the 1959 amendments and ruled that a candidate's appearance "on a news-type program in which he has participated in 'the format and production' " would be subject to "equal opportunities." *Use of Station by Newscaster Candidate for Public Office*, 40 FCC 433, 434 (1965) (hereinafter *Newscaster Candidacy*). *See* S. Rep. No. 562, 86th Cong., 1st Sess. 11 (1959). (See pars. 8 and 9, below, for further discussion).

B. Constitutional Arguments

4. While generally challenging the constitutionality of Section 315, Branch's specific concern here is that the Commission's interpretation of it, as applied to news reporters/candidates, is unconstitutional.[4] Branch alleges, citing *CBS Inc. v. FCC*, 453 U.S. 367, 395 (1981) (quoting *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 110 (1973)), that the Commission's exclusion of reporters from the news exemptions interferes with the ability of broadcasters to exercise their journalistic freedoms and singles out news reporters/candidates "from exercising any form of speech over the airwaves." We find these arguments to be without merit. Congress has determined in enacting Section 315 that there is a governmental interest in assuring that licensees afford equitable treatment to all candidates running for a particular office, and that this interest justifies imposing certain limitations on broadcast speech. *McCarthy v. FCC*, 390 F.2d 471, 473 (D.C. Cir. 1968). Moreover, Section 315 does not discriminate against Branch and

[4] To the extent that Branch is urging that the Commission cease enforcing Section 315 based on constitutional objections to it, we decline to take that action. The Commission has previously expressed its concern to Congress about the continuing wisdom of Section 315 and other content-control sections of the Communications Act and asked that consideration be given to repealing these provisions. We recognize that the constitutionality of a government agency's actions must always be subject to review, and in light of speech and press related concerns associated with its regulatory policies, the Commission has been particularly mindful of the constitutional dimensions of its actions. This is not, however, a proceeding in which there is a well developed record on the constitutional balancing involved in evaluating Section 315. We are mindful, moreover, that such constitutional decisions have "generally been thought beyond the jurisdiction of administrative agencies . . .." *Oestereich v. Selective Service Board*, 393 U.S. 233, 242 (1968). Thus, we decline to undertake a review here of previous determinations as to the constitutionality of Section 315.

those individuals similarly situated because all candidates for public office are treated in the same manner. As the Supreme Court observed in *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548 (1973)

> The restrictions . . . are not aimed at particular parties, groups, or points of view, but apply equally to all partisan activities of the type described. They discriminate against no racial, ethnic, or religious minorities. Nor do they seek to control political opinions or beliefs, or to interfere with or influence anyone's vote at the polls. [*Id.* at 564.]

5. Branch also alleges that the Commission's application of Section 315 is unconstitutionally overbroad because it prohibits nonpolitical appearances by candidates.[5] The Commission and the court of appeals specifically addressed the issue of "nonpolitical" uses where a legally qualified candidate asserted that his appearances as an entertainer should be exempt from the "equal opportunities" requirement of Section 315. *Pat Paulsen,* 33 FCC 2d 297 (B/c Bur. 1972), *review denied,* 33 FCC 2d 835 (1972) *aff'd sub nom. Paulsen v. FCC,* 491 F.2d 887 (9th Cir. 1974). (hereinafter *Paulsen*). The Commission, in denying the application for review, emphasized that Section 315 did not distinguish between political and nonpolitical "uses." Furthermore, the Commission pointed out that under the no-censorship provision of Section 315, a licensee could not require a candidate to present only nonpolitical material during a broadcast. *See Farmers Educational and Cooperative Union of America v. WDAY, Inc.,* 360 U.S. 525, 529 (1959). Further, in upholding the Commission's *Paulsen* decision, the court noted that a political and nonpolitical definitional approach to "uses" could raise serious first amendment problems in terms of enlarging the Commission's involvement in broadcasting operations. *Paulsen,* 491 F.2d at 891. Accordingly, we believe our interpretation is both consistent with the congressional intent and is reasonably tailored to avoid first amendment concerns.

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[5] Branch asserts that under the Commission's current application of Section 315 one of three situations would occur if he were to become a legally qualified candidate for town council: (1) his employment duties with KOVR would no longer include on-the-air appearances; or (2) he would have to take a leave of absence without pay with no assurance of being rehired after the election; or (3) KOVR would be required to provide his legally qualified opponents with free air time for all his appearances as a news reporter. Branch fails to mention, however, that it is possible for a station to seek a waiver or partial waiver from the opposing candidates of their "equal opportunities" rights where on-the-air employees of a station have become candidates for public office. *See Senate Committee on Commerce,* 40 FCC 357 (1962); *Licensee Obligations in Political Campaigns,* 14 FCC 2d 765 (1968). Such waivers would generally be binding as long as they were given with full knowledge of the relevant facts concerning the broadcasts. *WBTW-TV,* 5 FCC 2d 479 (1966).

C. Request to Modify Interpretation of Section 315

6. Branch also requests that the Commission modify its present interpretation of Section 315 and thus treat appearances by news reporters/candidates as exempt. Branch contends that the legislative history of the 1959 amendments clearly indicates that Congress did not intend for such appearances to be subject to "equal opportunities." In this regard, Branch asserts that it is "ironic" that in *Newscaster Candidacy* the Commission found the appearance of an employee newscaster to be a "use," but at the same time the Commission recognized the 1959 amendments were designed to encourage news coverage. To this effect, Branch cites *Newscaster Candidacy* where the Commission stated:

> Thus the main purpose of the amendment was to allow greater freedom to the broadcaster in reporting *news* to the public, that is to say, in inserting appearances of candidates as part of the contents of news programs. [*Newscaster Candidacy,* 40 FCC at 434.]

7. In light of the previously cited legislative history, *supra,* par. 3, it is clear that when a candidate appears on the air in the capacity of a news reporter, that appearance is not the type which Congress intended to exempt from the "equal opportunities" provision of Section 315. A news reporter, by the very nature of his position, may initiate and control his on-the-air appearances and is not the subject of the news program. These are precisely the types of activities that Congress identified as being inappropriate for a candidate to participate in when performed in conjunction with his appearance on an exempt program. Therefore, where a legally qualified candidate for public office appears on a bona fide newscast in the capacity of a news reporter, rather than as the subject of the news, such appearances are subject to the "equal opportunities" requirement of Section 315. *Newscaster Candidacy, supra; See generally, Henry Geller,* 95 FCC 2d 1236 (1983), *aff'd sub nom. League of Women Voters Education Fund v. FCC,* 731 F.2d 995 (D.C. Cir. 1984). To conclude otherwise, would be inconsistent with Congress' basic objective for enacting Section 315 — to prevent a legally qualified candidate from gaining an advantage over an opponent through favoritism or gaining access to a broadcast facility. S. Rep. No. 562, 86th Cong., 1st Sess. 8-9 (1959); *Paulsen v. FCC, supra.* The *Paulsen* court agreed that the exposure which a candidate receives from any television appearance may render an invaluable advantage to his election campaign. In this regard, the court stated:

> A candidate who becomes well-known to the public as a personable and popular individual through "nonpolitical" appearances certainly holds an advantage when he or she does formally discuss political issues to the same public over the same media. [*Paulsen v. FCC,* 491 F.2d at 891.]

8. In view of the foregoing, and pursuant to Section 1.2 of the Commission's rules and regulations, the request for declaratory ruling IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appeal, Denied
Comparative Programming

Review Board denies authorized appeal from ALJ's order denying petition to add a comparative programming issue. The applicant failed to make sufficient threshold showings, as required by *Chapman Radio and Television Co.*, 7 FCC 2d 213 (1967), and *George E. Cameron, Jr. Communications*, 71 FCC 2d 460 (1979), which decisions have continuing vitality.
—*Wilshire District B/cing*
MM Docket No. 84-932

FCC 85R-43

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Wilshire District Broadcasting Co., Inc. *et al.*,	MM Docket Nos. 84-932 to 84-937
For Construction Permit Santa Barbara, California	

MEMORANDUM OPINION AND ORDER

Adopted: May 13, 1985; Released: May 17, 1985

BY THE REVIEW BOARD:

1. This appeal was filed on March 7, 1985 from Administrative Law Judge Luton's refusal to add a comparative programming issue based on Mission Broadcasting Corporation's failure to make the threshold showing required by *Chapman Radio and Television Co.*, 7 FCC 2d 213, 9 RR 2d 635 (1967). Permission to appeal that ruling was granted by the ALJ because Mission's argument raised "some question concerning the continuing vitality of *Chapman, supra.*" After considering Mission's appeal and oppositions filed March 13 and 29, 1985, the Review Board has concluded, for the reasons set out below, that the stringent threshold requirement of *Chapman* has not been modified and affirms the ALJ's

reasonable application of that requirement. *See Chase Communications Co.*, FCC 85R-33, released April 23, 1985.

2. The applicants in this comparative case propose to establish a new television station in Santa Barbara, California. By Memorandum Opinion and Order, FCC 85M-540, released February 6, 1985, the ALJ denied a programming issue because Mission's threshold showing had failed "to relate the claimed superiority in proposed programming to demonstrated community needs" as required by *Chapman, supra.* While recognizing that the Commission has abandoned the formalistic "ascertainment" requirement, the ALJ ruled that *Chapman* still requires some concrete effort to discover a community's needs and interests "resting on a more assured and objective basis than the self-interested expressions of Mission's principals as are offered here." FCC 85M-540, at para. 3.

3. By a separate Memorandum Opinion and Order, FCC 85M-868, released February 27, 1985, Mission was granted leave to appeal by the ALJ who indicated that some cases relied on by Mission appeared to present the question of whether "the Commission dispenses with a true needs showing . . . requiring instead only a showing of a numerically significant Hispanic-background population from which a community need for the proposed service is to be inferred." *Id.*, at para. 4.

4. We agree that at the time he acted, the ALJ correctly identified the narrow issue which appeared to require additional review. However, the ALJ did not have the benefit of the Board's ruling that an applicant like Mission which seeks a comparative programming issue "must first seek an additional specific programming issue and meet the traditional, stringent test of producing a threshold showing of the particular needs of the service area for its proposed programming and how its proposed programming will meet the specific identified needs of the service area." See *Chase Communications Co., supra.*, at n. 6. The Board also indicated in *Chase* that not only *Chapman, supra,* but also *George E. Cameron, Jr. Communications,* 71 FCC 2d 460, 464-466 (1979), modified in *Comparative Broadcast Hearing Procedures,* 75 FCC 2d 721 (1980), should be consulted for a "discussion of the need for specific programming issues and threshold showings where programming evidence is proffered under the standard comparative issue." See also *Cookeville Broadcasting Co.*, 19 RR 897, 899 (1960) (threshold showing for programming issue in Section 307(b) cases).

5. Thus, our previous ruling in *Chase Communications, supra,* at n. 6, rejects Mission's contention that some question exists concerning the continuing vitality of the *Commission's* threshold requirement. To the extent that Mission's proposed programming issue sought comparative credit for providing a Spanish language service format, as we noted in *Chase, supra,* it also had to comply with the evidentiary condition

precedent set out in *Cameron* and its progeny. Mission asserts that *Big Bend Broadcasters,* FCC 84-645, released December 26, 1984, note 3, the most recent Commission precedent on that point, holds otherwise. But there the applicant had shown that it proposed 33% Spanish programming to a remote community with a 47.8% Hispanic population receiving only ten and one quarter hours of Spanish programming per week. Here Mission did not show how much specialized programming is available in the area, nor did it even identify the stations which place the required signal over Santa Barbara.

6. Consequently, the ALJ correctly found that Mission based its request for a programming issue on self serving expressions of its principals and not on "a more assured and objective" factual study of the needs and interests of the service area. While the Commission abolished the formal ascertainment requirements, it retained the "obligation on the part of each station to offer programming responsive to community issues." *Deregulation of Radio,* 87 FCC 2d 797, 804 (1981). It also noted that those broadcasters who, like Mission, "wish to take advantage of the ability to tailor narrowly their programming should be the ones to bear the costs of assessing the availability of programming in the community." *Id.,* at n.7. See also *Broadcast Communications,* 97 FCC 2d 61, 62 (1984). We therefore affirm the ALJ's denial of a comparative programming issue.

7. ACCORDINGLY, IT IS ORDERED, That the authorized appeal of the ALJ's Order, filed March 7, 1985, by Mission Broadcasting Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*